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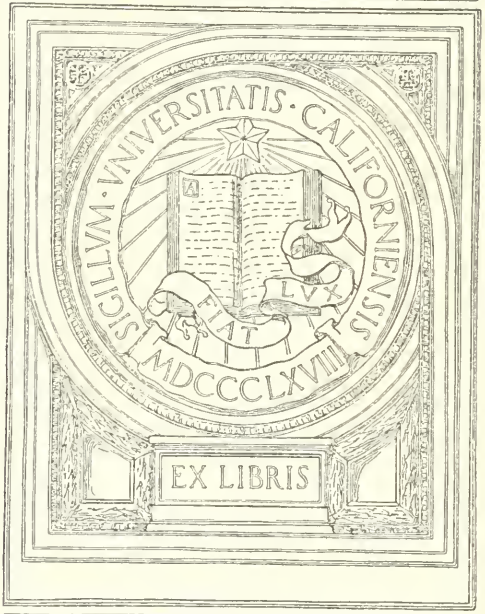

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CHINA'S NEW CONSTITUTION

AND

INTERNATIONAL PROBLEMS

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CHINA'S NEW CONSTITUTION AND INTERNATIONAL PROBLEMS

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FOREWORD

In their original dress the following chapters first appeared in the *China Press*, the defunct *Peking Gazette*, etc. Acting upon the advice of numerous friends who are good enough to consider that the same should be preserved for the public in a more accessible and permanent form than being tucked away in the various newspaper files extending over seven months, they are now collated together in a book form.

With the exception of a few verbal changes, here and there, no serious attempt has been made to add or subtract anything from the original text. Thus Part II on *Diplomatic Relations between China and the Powers since and concerning the European War* remains as it was first published, it being thought that the events posterior to the formal declaration of war between this country and the Central Powers may be more conveniently dealt with in their composite character on a future occasion or by other abler pens.

The papers were written between the spare hours of daily classroom work from December, 1916, to July, 1917, as Lecturer on International Law, when opportunities for exhaustive checking or verification of all available data or references were limited. Add to this the fact that owing to the shortage of available types,

the printers could only print the volume in instalments of 32 or 48 pages at a time, thus making it difficult to correct subsequently whatever errors might be discovered later, inaccuracies or inadvertences here and there are inevitable.

For example, on pp. 124-125, the remarks on the individuality of the new Chinese Constitution may be revised to read that the appointment of the Chief Justice of the Supreme Court with the approval of the Senate occurs also in the American Constitution; that the United States Vice-President is not a member of the Senate, although he is its presiding officer; and that the appointment of the Premier with the approval of the House of Representatives has a somewhat closely resembling precedent in the British Constitution.

Moreover, since the publication of the pages (170-173) discussing the Dutch claim to the protection of Germans in China, it has transpired that as a matter of *temporary expediency* the Chinese government had consented to the Dutch contention in respect of minor offences, although offences involving breach of neutrality regulations and vital interests must be justiciable by Chinese courts. This, however, was only temporary, and so did not affect the legality of the arguments in the text. Of course, with the declaration of a state of war between the Republic and Germany, all Germans became at once subject to Chinese jurisdiction.

But these unintentional errors apart, it is to be hoped that the volume will yet be found to have its

share of usefulness, especially in view of the importance of the subjects discussed herein.

At the moment of writing the series on *China's New Constitution*, the charter was almost completed and needed only a few extra articles to accomplish the great task of drafting a permanent constitution to replace the Provisional Constitution. The illegal dissolution of Parliament, however, put an end to the great work and nullified the labours of nearly nine months. Whether or not the next Parliament to be assembled will complete the unfinished task of its predecessor, or whether it will redraft the existing Provisional Constitution *de novo* remains yet to be seen. Nevertheless, it appears that even if an entirely new charter is to be established, the new constitution drafted by the Parliament of 1916–1917—namely, that which is here analysed and discussed in Part I—will still be found highly serviceable as a beacon light to guide the steps of future legislators. Hence its inclusion in the present volume.

Part IV on *China and the Peace Conference: Problems of Treaty Revision* is a summary of a portion of the author's earlier volume, "The Legal Obligations arising out of Treaty Relations between China and Other States." The entrance of this Republic into the war as a co-partner with the Entente Allies means that the so-called Chinese Question will also come up for re-examination and readjustment at the *post-bellum* peace conference. If so, the concluding section of this book may perhaps be found to have its use.

Owing to the pressure of newspaper work the bringing out of the present volume has been considerably delayed, nor has it been found possible to compile an exhaustive General Index for the convenience of the readers; but it is hoped that the Analytical Table of Contents will be found equally serviceable for the purpose.

The author desires to express his indebtedness to His Exc. Paul S. Reinsch, the American Minister, for his courtesy in contributing an Introductory Note to Part I on *China's New Constitution*, as well as to the publishers of the *China Press* and the *Peking Gazette* for permission to reprint the chapters included in this volume.

Peking, June, 1918.

M. T. Z. T.

INTRODUCTORY NOTE TO PART I

The intensive study of constitutional law and practice by Chinese scholars will be welcomed by everyone who takes an interest in the development of Chinese political institutions.

The attempt to formulate a modern constitution adapted to the needs of this vast body politic, is one of the most important enterprises ever undertaken by public men. While it would not be fitting for me to pronounce an opinion or judgment upon the results so far obtained, yet I am able to bear witness to the painstaking efforts expended by the members of Parliament upon the consideration of every phase of constitutional law. The problem is indeed a difficult one. It is not only that a great many foreign constitutions have to be studied, their detailed workings understood and their relative efficiency judged of, but a matter of still greater difficulty is the correct perception of what is required by the inherited social constitution of China and the customs and ideas of its people.

To an outside observer it seems most important that the inherited means of social action and regulation should be utilized in building up the new political institutions of China. The values which have been created through long action and experience in the

broader organization of the family, in the self-government of the villages, and in the cohesion of the provincial units, are the starting point for future political progress in China. If it can be achieved that to these national elements of organization there are super-added the best results of the political experience of other countries who have given their national institutions a definite legal form, it may be hoped that a national organization for political action may be created in China which will really represent, express, and contain in itself the sum of the social, economic, and political energies of this great people.

That such a harmonious and efficient coördination of national force may be achieved at an early date is the hope of all friends of China. Of this coördination of the living forces of national life the constitution ought to be the adequate expression.

Peking, June, 1918.

Paul S. Reinsch.

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PART I

CHINA'S NEW CONSTITUTION

PART I

CHINA'S NEW CONSTITUTION

The task of Constitution building in Peking has reached a stage when the epochal document may fairly be treated in a comprehensive manner. The second reading of the draft constitution is almost completed, save a few articles which are being re-discussed. As a matter of fact the work bade well to have been finished by now, had not the regrettable coercion of Parliament, on May 10, concerning the question of a declaration of war against Germany, obtruded to impede its progress. In anticipation, however, of the early completion of this *magnum opus*, the President with the advice and consent of Parliament, has already issued a mandate declaring a national holiday of three days to celebrate the promulgation of the new Constitution. And soon the country will acclaim: "The Provisional Constitution is dead. Long live the new Constitution!"

To do justice to the subject, we propose to discuss it under the following main headings:—1. History of Constitutional Development. 2. Analysis of the New Constitution. 3. Estimate of the New Constitution.

CHAPTER I

HISTORY OF CONSTITUTIONAL DEVELOPMENT

At this date it may seem needless to trace the history of such development. But if we are to understand the present, the past can in no wise be neglected; for it is only by the aid of some sort of retrospect that we may appreciate the inner workings of the spirit which is to-day moving through the whole length and breadth of this land.

In such an inquiry it is usual to point to the time when the late Manchu dynasty first evinced any willingness to grant popular government to the Chinese as the beginnings of this constitutional development. For our purpose, however, we need to cast our eyes a long way further back than the mere trifle of two decades. We need to go to the dawn of Chinese history, if we are to ascertain the true origin of Chinese constitutional seedlings.

The ideas of a modern body politic, the conceptions of a well-ordered government, cannot be reared on barren soil. They require earth, air, sunshine and plenty of nutrition. They are not easy to assimilate and, without some sort of foundation, it is not easy to engraft them to the tree of Chinese political philosophy. The truth is that the foundation is there, when the modern ideas of government and administration are sought to be so engrafted. This foundation is China's unwritten constitution, or the science of government erected on the political philosophy of the Confucian Classics.

China's Unwritten Constitution

When we speak of constitutions, we may refer to either a written or an unwritten constitution. That which Parliament is now heroically completing is a written constitution, like all other charters in the world, with the notable exception of the British constitution which is unwritten.

An unwritten constitution, however, has always existed in China ever since the days when Europe was yet uncivilized. Prior to the establishment of the Republic, the form of government was nominally an absolute monarchy. Now this absolutism is "an irresponsible autocracy; its institutions are autocratic in form, but democratic in operation."[1] Accordingly, the change from autocracy to democracy was not so violent as one would imagine from the surface of things.

To elevate the Confucian Classics into an unwritten constitution may sound unconvincing, but after all the resemblance is not far to seek. The important thing is what is meant by a constitution. Produce a definition at once acceptable and workable, and all will agree. As a Chinese constitutional lawyer put it:—"China has no constitution, if by a constitution one means a written instrument ordained and established by the people of the United States of America, or one granted nominally by a king as that of Prussia; but if by constitution one means a body of customs, traditions, precedents, as that of England,

[1] Prof. H. A. Giles, The Civilisation of China, 41.

China has one. As the Christians cherish the Scriptures; the English, Magna Charta; and the Americans, the Constitution; so the Chinese cherish the Confucian Classics."[1]

Now this love for the Classics springs from something more than mere eclectic literary taste. It is an affection born of gratitude and endearment, as such literature has long played the part of the palladium to the people's liberties. In them are recorded the deeds and words of illustrious rulers, the teachings and doctrines of the sages and philosophers. To the different succeeding rulers these contain mandatory directions or precedents to be followed and observed. And to the people they constitute a beacon-light of their heritage and birthright.

The directions to govern a country in the interests of the people are positive, and the injunctions not to arrogate the state to one's own patrimony are negative. One and all they are meant to be scrupulously obeyed, and the emperor can break, violate, or disregard neither the one nor the other. He is, of course, not bound by law to conform to them; but if he disobeys them, he does so at his peril.

What the English publicist, Bagehot, denotes as the "cake of customs" is nowhere better illustrated than in China. Here, customs and traditions are everything, and judged by the standard held forth by the rulers and sages of the Classics, an emperor must needs bow before the unyielding rigidity of the political habits of the people and the stern authority of their

[1] Dr. Hawkling L. Yen, A Survey of Constitutional Development in China, 13.

venerable customs. As was summed up by the Chinese author we have already quoted, "on the one hand they (the Classics) have curbed the multitude in their radical tendencies and, on the other, acted as bulwarks for the people against unwarranted governmental encroachments."[2]

Confucian Classics

Accordingly, it is laid down in the Book of History as follows:—"The former emperors and ancient sages teach that the common people may be associated with, but cannot be looked down upon; that the people is the root or the foundation of the country; and that if the foundation is firm, the country is peaceful and happy." Therefore, the people, and not the ruler, is the factor that counts in the country. "Heaven gives birth to millions of people, and for them it erects the king and teacher." It is for the ruler to minister unto the welfare of his people, and not for the latter to gratify his whims and pleasures. The appointment of the ruler is divine, and his mission is to promote the well-being of his subjects. The latter's interests are to be looked after and their wishes are to be heeded. *Vox populi, vox dei.* If he proves unworthy of the great trust, he is unfit to rule and must make way for a more capable person. Or, as the Book of Odes has it:—

"Heaven in giving birth to a multitude of men,

Endows them with faculties each having its specified law;

[1] *Ibid.*

And the people, in exercising the faculty endowed, Love admirable virtues."

Here we have in embryo the fundamentals of a limited monarchy, although the details remain to be worked out. From a limited monarchy to a republic is not a far cry, and therefore the change from autocracy to democracy requires no violent wrenching from old traditions. Grounded on such political conceptions, the people are ripe for a greater measure of liberalism than is vouchsafed in a limited monarchy. To admit the people as the co-equal of the ruler is but a preliminary to the recognition that the people, and not the ruler, is the sovereign of the country. So when the new ideas of government and administration based on a written constitution came along, they fell on good, fertile ground and brought forth fruit, some a hundredfold, some sixtyfold, and some thirtyfold.

Beginnings of a Written Constitution

So much for China's unwritten constitution. It is admirable, so far as it goes. But it has its defects, the chief of which being its lack of legal sanctions. As we have already seen, there is no law, but only public opinion, to compel an emperor to observe the precedents and injunctions established by his illustrious predecessors. If he is unprincipled, he can do pretty much what he likes. The Chinese are essentially law-abiding and long-suffering, and as long as the breaking-point is not over-stepped, the elasticity of their patience is capable of considerable extension. Thus it happens that they are willing to submit to a govern-

ment which is inefficient but does not impose too heavy burdens upon them, and which though effete, yet manages to make life not too intolerable.

Vox Populi, Vox Dei

This may sound like a paradox, but like all paradoxes, it is not without its truths. For given a decent margin of comfort sufficient to make life worth living, the masses in China are capable of much patience. So long as they are not driven to the desperation of self-defence, they will put up with many things which to the Western mind may be unbearable. We are, however, referring to political and social conditions in this country, not in Europe or America. But make their lives so intolerable that they must needs either perish by their own hands or be slowly starved to death, and the divine mandate will be invoked for their protection. The ruler has abused his mission and so he must be made to amend his conduct, or else retire in favor of a more worthy successor. Once more it is a case of *vox populi, vox dei.*

Popular Agitation

The circumstances which give rise to this eventuality will, of course, depend upon the conditions prevailing at the time, or the particular needs of the country. And Chinese history records many instances of revolutions, assassinations and abdications. Now, coming to our own time, the circumstances which demand such overhauling are manifest. Under the administration of the last alien dynasty the conditions of the country slowly went from bad to worse. Once

upon a time the name of China compelled fear and respect; but under the later Manchus, it became the synonym for impotence and inefficiency. Since the "Opium War" of 1840, the territory of China was no longer one compact, homogeneous whole, and wherever one turned one saw nothing but disappointment and humiliation.

Then the Goliath of Asia was laid low by David in the guise of Japan, and then the air was rife with rumors of the imminent partition of China. The storm of popular feeling was gathering, and in deference to it, Emperor Kuang Hsü introduced his famous reform measures. But his confidence was misplaced, and the *coup d'état* of 1898 occurred. The Boxer uprising broke out, and then swift retribution from the foreign powers followed. The Empress Dowager fled to Sianfu in Shensi, and there had time to think the matters out. With the signature of the International Protocol of September 7, 1901, the imperial court returned to the capital in a more sober frame of mind. Thenceforth the people were convinced, once and for all, that if this great heritage of theirs was not to be frittered away, they must demand their birthright. The Manchus had proved themselves inefficient, and therefore the people themselves must participate in the government of the country. The popular clamor increased, and it needed only a Russo-Japanese war to give it a lever. The Manchus scented danger and so prepared to cave in. Thus began the beginnings of a written constitution.

Promise of a Constitution

As far as the actual documents are concerned, the first edict which refers at all to a constitutional form of government is that of September 1, 1906. But it seems fair to refer also to the earlier edict of 1901, issued when the Empress Dowager was in retirement at Sianfu. This decree created a new Bureau for Governmental Affairs, or *Chêng Wu Ch'u*, the duty of which was to memorialise the throne concerning what ought to be done and what to be left undone. And in the light of subsequent events, it seems reasonable to infer that the hand of this bureau was behind most of the later edicts dealing with matters legal, political, and educational. Unfortunately, however, the conversion of the Manchus was not complete, and many of the schemes existed merely on paper. Nevertheless, it is interesting to-day to note the gradual change that was coming over the minds of the rear guard of a tottering dynasty in those good old days.

Edict of 1906

With the triumph of Japan in her struggle against Russia, events moved rapidly. In deference to the popular clamor for the right of representation in the administration of the country, the government sent out, in December 1905, a commission of five high officials, headed by a Manchu, Duke Tsai Tse, to Japan, Europe and America to study the constitutional systems of the West. Upon their return, the commissioners reported favorably on their investigations and urged the grant of a constitution and parliamentary representation

at an early date. The edict of September 1, 1906, was the response. In it the throne ordered a reform of the laws and finances, the reorganisation of the army, and the adoption of a constitutional government in the near future, the supreme control, however, remaining vested in the throne. The material part of this memorable state paper is as follows:—

"Now, these (Constitution Investigation) ministers have returned, and in their report all submitted their opinion ..... that the weakness and inefficiency of our country is due to the lack of close touch between the government and the people, and the entire separation of those who are in office and those who are not. The officials do not know how to protect the people, and the people how to defend the country. That other countries are wealthy and strong is primarily due to the adoption of a constitution, by which all the people are united in one body and in constant communication, sane and sound opinions are extensively sought after and adopted, powers are well divided and well defined, and financial matters and legislation are discussed and decided upon by the people. Moreover, other countries look to one another for improvement, and amend their constitutions and change their laws to their highest efficiency. So it is not a mere accident that their governments are in such a good working order and their people enjoy so great happiness.

"In view of the situation our country is in, there is no other way to power and prosperity than, after having carefully and minutely examined the constitutions of other countries, to adopt one by selecting por-

tions of all, if necessary, best suited to us, whereby all civil affairs are open to the public, but the controlling powers remain with the Throne, so that a permanent and proper foundation may be laid for our country. But at present no definite plan has been decided upon and the people are not educated enough for a constitution; if we adopt one hastily and regardless of the circumstances, it will be nothing more than a paper constitution. Then how can we stand before the people and ask them to repose confidence in us?''

Edicts of 1907

Accordingly, a decree of September 20, 1907, commanded the establishment of a State Council or *Tzu Chêng Yuan*, presided over conjointly by a Manchu, Prince Pu Lun, who attended the St. Louis Exposition, in 1904, as China's representative, and a Chinese, Grand Secretary Sun Chia-nai. This is a single chamber legislature ''to serve as the foundation of a Parliament, inasmuch as the latter cannot be established at present.'' And in the following month an edict of October 19, 1907, created Provincial Assemblies in all the provincial capitals. These are ''to ascertain the public opinion, so that the people in the provinces may have the opportunity of pointing out and stating the benefits and evils existing in their particular provinces, and also of planning the local peace and being trained for service in the State Council in the Capital.'' If the measures are important, the sanction, however, of the throne must first be obtained.

Nine Years' Preparation Program

The country felt itself ripe for a constitution, and so regarded the mere promise of that charter as tantalisingly indefinite and intangible. The demand being insistent, an edict of August 27, 1908, promised the grant of a constitution after nine years, namely in 1917, and meanwhile the work of preparation for that step must be studiously carried out. The program of preparation is spread out as follows:—

"First Year: opening of local self-government councils, enactment of self-government regulations, adjustment of finances and taking of a census;

Second Year: putting in force of local self-government electoral law, announcement of regulations for parliamentary representation, investigation of provincial revenues, organisation of courts of justice;

Third Year: convocation of parliamentary representation councils, promulgation of new criminal law, experimental government budget, regulations for official recommendations and fees;

Fourth Year: promulgation of local court laws;

Fifth Year: issue of new regulations for taxation and announcement of new government organisations:

Sixth Year: commencement of administrative justice, adoption of budget;

Seventh Year: preparation of accounts of government revenues and expenditure;

Eighth Year: fixing of Imperial Household expenditure, establishment of judical bureau, and issue of statistics;

Ninth Year: announcement of the Imperial Constitution and the Imperial Household law, promulgation of election law."

The Provincial Assemblies were opened on October 14, 1909, and the State Council on October 3, 1910. The latter, being designed as the foundation of the future Parliament, is a national assembly so far as its organisation is concerned. It is a single chamber, but yet contains the elements of two chambers: (1) the representatives of certain privileged classes as the basis of the future Upper House; and (2) the representatives from the Provincial Assemblies as the basis of the future Lower House.

Opening of Parliament Antedated

To the progressives of the country a period of nine years was too long to wait. So petitions and delegations followed one another in close succession, demanding an earlier convocation of Parliament. In response the decree of November 4, 1910, consented to antedate the opening of Parliament by four years, namely in 1913. The rescript is worded as follows:— "Now, seeing the sincere prayer of the popular delegation and the desire for speedy progress on the part of almost half of the officials, metropolitan as well as provincial, and the growing interest and unanimous opinion of the people, we are warranted in holding that the people are ready to assume the responsibilities under a constitutional government. Therefore, we comply with their wish to give respect to public opinion. But before the opening of a Parliament, preliminary measures are important and

numerous, and cannot be accomplished in less than one or two years. So it is hereby commanded that .....the official system shall be reformed, published and tentatively applied at an earlier date as a preliminary step to the organisation of a Cabinet; and that ..... a Constitution, along with regulations governing Parliament, the election of the members of the Upper and Lower Houses, and other regulations pertaining to the Constitution, shall be drawn up and published before the opening of Parliament.''

China's Magna Charta

There the matter rested until the Revolution broke out at Wuchang on October 10, 1911. In reply to the menacing telegram of General Chang Chao-tseng and other generals stationed with their troops within immediate striking distance of Peking, demanding the immediate promulgation of a constitution, the State Council was commanded to draw up a constitution to placate the nation. This was done, that body telegraphing to the various Provincial Assemblies to collect their views, and also proposing that "in all matters of importance at present, the troops be allowed temporarily to give their opinion in order to satisfy the wishes of the people.'' On November 3, 1911, the famous Nineteen Articles of the Constitution, or China's Magna Charta, were promulgated as follows:—

"I. The Imperial line of the Chinese Empire can continue perpetually unchanged.

II. The person of the Emperor is sacred and inviolable.

III. The powers of the Emperor shall be limited by the Constitution.

IV. Succession to the Throne shall be determined by the Constitution.

V. The Constitution shall be drafted and passed by the Senate [State Council] and promulgated by the Throne.

VI. Amendments in the Constitution shall be initiated by the National Parliament.

VII. The members of the Upper House shall be elected by the people, the electorate being limited to those who have certain qualifications required by law.

VIII. The Prime Minister shall be elected by the National Parliament and his appointment ratified by the Emperor. Ministers of State shall be recommended by the Prime Minister and appointed by the Emperor; no members of the Imperial House shall act as Prime Minister, Minister of State, or High Officer in the Provinces.

IX. If the Prime Minister is denounced by the National Parliament, either the latter shall dissolve or the former resign, but there shall be no dissolution of two successive Parliaments during the same Cabinet.

X. The Emperor shall be the Commander-in-Chief of the Army and Navy, but no military or naval force shall be employed within the Empire, except in accordance with the rules expressly provided therefor by the National Parliament.

XI. No ordinance shall set aside the laws on anything settled by law, except in the case of an emergency ordinance, for which special rules shall be drafted.

XII. No treaty shall be concluded without the approval of the National Parliament, but in case of a declaration of war, or of the conclusion of peace, when Parliament is not in session, approval may be given at a subsequent session.

XIII. The official system and the rules governing it shall be decided by law.

XIV. In case the budget of any year is not passed by the National Parliament, that of the preceding year shall hold good for that year. There shall be no fixed annual expenditure, and there shall be no extraordinary excess of expenditure beyond the budget.

XV. The amount of the expenditure for the Imperial Household, and any increase or decrease therein, shall be voted by the National Parliament.

XVI. No ceremony of the Imperial House shall be contrary to the Constitution.

XVII. Administrative courts shall be established by both Houses of Parliament.

XVIII. All acts passed by the National Parliament shall be promulgated by the Emperor.

XIX. For the purposes of Articles 8, 9, 10, 12, 13, 14, 15 and 18 the Senate shall be deemed to occupy the position of the Parliament until the latter shall have been convoked.''

Here we have the Magna Charta of Chinese Liberties which at other times might have satisfied the nation. The wildest hopes of the people have been exceeded, and the latter have regained their inheritance. But the concession had come too late, and nothing short of the abdication of the Manchus would conciliate the revolutionaries. So the remnants of a once proud house had to obey the divine mandate and make their exits.

Events leading up to the Present Constitution

Now we are in a position to marshal the events which directly led up to the present constitution. After rejecting the above Nineteen Articles, twenty-three delegates from ten provinces met at Wuchang on November 30, 1911. There they drew up a Compact of twenty-one articles, governing the organisation of the provisional government. This document formed the foundation of the Provisional Constitution of Nanking of March 11, 1912, and this same document is the draft of the constitution which is being revised at present.

The Wuchang Compact

Under the Compact, a "People's Meeting" will be held within six months to discuss and decide upon a written constitution. And a President is to be elected by the representatives of military governors, each province to cast only one vote. The Executive Department is to consist of five boards or ministries —*i.e.* Foreign Affairs, Home Affairs, Finance, Military and Communications. But nothing is men-

tioned about the people's rights—a section which now comes under Chapter III of the new Permanent Constitution.

A few days later, Nanking fell into the hands of the revolutionary forces, and thenceforth that city became the seat of the provisional government. Delegates from seven other provinces arrived to discuss the constitution. They criticised the imperfections of the Wuchang Compact and suggested that provision should be made for a Vice-President. Moreover, the exact composition of the departments of state might be omitted from the constitution, but the former number of five could hardly be considered as adequate. It was, however, not easy to amend the original Compact; so it was decided instead to draft a Provisional Constitution. The latter was promulgated by the Provisional President, Dr. Sun Yat-sen, on March 11, 1912.

The Provisional Constitution

This Provisional Constitution of fifty-six articles is the one under which the country has been living for the last twelve months, and which will soon be replaced by the new Permanent Constitution. It differs from the Wuchang Compact in the following particulars: The rights and liberties of citizens are set forth in ten articles in Chapter II. The number of delegates from each province is raised from three to five. Provisions are made for an independent judiciary as well as a President and Vice-President. The Cabinet is to be responsible to Parliament, and a National Assembly or Parliament is to be convoked within ten months.

Accordingly, the laws and regulations governing the composition and election of the National Assembly were promulgated. Under these regulations the Assembly now consists of two houses, with 274 Senators and 596 M. P.'s. The Senate represents the various interests of the nation. For example: the provinces, the educational associations, the oversea population or Chinese residing in foreign countries, and the Mongolian and Tibetan dependencies. The Senators sit for six years, but one-third of the total number is to retire every two years. On the other hand, the House of Representatives represents the country at large, and its members sit for three years. This National Assembly first met on April 8, 1913, or the year when Parliament even under the Manchus was to have been ultimately convened.

Draft of the New Constitution

Under Article 54 of the Provisional Constitution the National Assembly is empowered to draft and promulgate a permanent constitution. Accordingly, each house elected thirty men to constitute a Constitution Drafting Committee. For about four months (July 10-October 31, 1913) this body met at the Temple of Heaven. This fact is eloquent, for it was in this shrine that ancient emperors offered annual sacrifices to Heaven on behalf of the people and pledged their obedience to the divine will that they should minister unto the well-being of the root or foundation of the country. The draft constitution of one hundred and thirteen articles was completed and, on November 3, 1913, it was submitted to the Constitution Conference

—the two houses assembled for the discussion and making of the permanent constitution.

Then on the next day, the Kuo-ming-tang members or Democrats in Parliament were unseated by a Presidential mandate of Yuan Shih-k'ai. This destroyed the quorum in both houses, and so the Nationa Assembly was in effect dissolved. A month previously, however, the Assembly yielded to the suggestion of Yuan and passed Articles 56-62 of the draft constitution respecting the election of a President and Vice-President. Accordingly, Yuan was elected President, and General Li Yuan-hung, Vice-President. And the new Republic was thereupon on October 10, 1913, the second anniversary of the Revolution, formally recognised by the foreign powers other than the United States, Brazil, Peru and Cuba, who had some six months earlier already accorded their recognition.

The Amended Provisional Constitution

The hands of President Yuan were now quite unfettered. He appointed a State Council or *Ts'an Chêng Yuan*, which in turn appointed a committee to draw up a new constitution. This is the Amended Provisional Constitution of sixty-eight articles, promulgated on May 1, 1914. Under this instrument Yuan was made a virtual dictator, and all executive, legislative and judicial powers were centered in his person. Moreover, there was no limit to his term of office, and if he so wished, he could continue in the same for life.

Revival of the Provisional Constitution

Then on June 6, 1916, the would-be emperor, as well as Lord Kitchener, passed away. The Provisional Constitution of March 11, 1912, was revived and, in September, the National Assembly was reconvoked. The revision of the draft constitution was immediately taken up and, as we have already stated, will soon be completed and promulgated.

Thus 1917 will be a memorable year in all history. For it is the year when the United States joins the great war for liberty and humanity, when China takes her stand on behalf of the sanctity of international law, when the new Chinese Constitution will be completed, and also, let us hope, when the great issues of liberty and freedom for nations as well as individuals, will be fought to a successful termination.

CHAPTER II

ANALYSIS OF THE CONSTITUTION

SECTION I. FUNDAMENTALS OF THE CONSTITUTION

We will now analyse this epochal document and examine its principles in the light of the constitutions of other nations, especially the republics of the United States and France, etc. For the texts of non-Chinese constitutions, or translations thereof, we will consult W. F. Dodd's "Modern Constitutions" (1912), 2 vols.

Sovereignty of the People

(1) To begin with, we will discuss the fundamentals of the constitution. Chapter I ordains a permanent republican form of government—namely, the Republic of China. Chapter II deals with the national territory of the republic, the different parts or units of which cannot be altered except in accordance with the law. A new article is inserted in Chapter I as follows:—"The sovereignty of the Republic of China is vested in the entire body of the people."

This addition was consented to only after some discussion, as those who opposed its inclusion pointed to its absence from the American and French constitutions. On the other hand, those who supported the proposal pointed to its presence in the present Provisional Constitution (Article 2) in precisely the same phraseology, as well as in the Belgian, Chilean and

Mexican charters. For example, Article 25 of the Belgian constitution (1831) reads as follows:—"All powers emanate from the people;" and Article 3 of the Chilean constitution (1833):—"Sovereignty resides essentially in the nation, which delegates its exercise to the authorities established by this constitution."

Since the established form of government is a republic, it was finally agreed that the fact of the sovereignty of the people should be clearly stated. And this clearness is best illustrated in the Mexican constitution (1857), Article 30 of which provides thus:—"The national sovereignty is vested essentially and originally in the people. All public power emanates from the people, and is instituted for their benefit. The people have at all times the inalienable right to alter or modify the form of their government."

Two-Chamber System

(2) The legislative body is constituted on a bicameral basis, namely, the Senate and the House of Representatives. Now this provision comes only in Chapter IV, after the chapters on the form of government, the national territory, and the rights of citizens, whereas in the case of the United States and France, etc., it occurs as the very first article of their constitutions. Thus the former lays down that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." And the latter:—"The legislative power shall be exercised by two assemblies: the Chamber of Deputies and the Senate."

This provision also came in for a considerable discussion. On the one hand, it was suggested that as the Senate was a mere figure-head, it should be abolished. Moreover, if in the Upper House one political party should be in the majority and in the Lower House another party, then the two houses would be in constant conflict with each other. On the other hand, it was shown that if only the universal suffrage system for the election of M. P.'s be adopted, then various other interests which are now represented in the Senate would not be so represented. Moreover, the bicameral system is the universal rule in all parliaments of today, and the fact that the French Parliament has now two chambers, after the single chamber system had been twice experimented upon unsuccessfully, is regarded as significant. If at present there is no material difference between the functions of the two houses, this is because the National Assembly is not yet properly constituted, not because the bicameral system itself is at fault. Finally, the provision was retained by an overwhelming majority.

A Responsible Cabinet

(3) The sovereignty of the people being expressly established, it follows that the Cabinet is responsible to Parliament (Chapter VII). And in express confirmation of the supremacy of Parliament, it is laid down that the House of Representatives may pass a vote of lack of confidence on the Administration. Should the Cabinet not resign after this adverse vote, then Parliament must be dissolved. We are here mere

ly surveying the fundamentals of the constitution, so the question of a responsible Cabinet will be fully dealt with in its proper place.

This subject being highly contentious, the ground was fought over again and again. The opponents of the proposal were of the opinion that the executive and the legislature should each be placed on an equal footing; otherwise, the unfettered powers of Parliament might cause embarrassment to the country. If the policies of the Administration should fail to be endorsed, Parliament could easily compel it to change the same by refusing to pass its budget, without resorting to the unpleasant task of passing a vote of lack of confidence. Besides, it requires only a bare majority vote to pass such a censure on the government; so the work of the members of the Cabinet would be more perfunctory than conscientious.

On the other hand, those who supported the proposal pointed out that there was a material difference between a vote of censure and an impeachment. If a Cabinet minister is guilty of an offence in law, he is liable to impeachment. But if he commits an error in judgment in a matter of policy or administration, he cannot be so impeached. The Cabinet is responsible to the Lower House, and so the right of supervision over the conduct of the Cabinet inheres in Parliament. Under the new constitution, the appointment of the Premier only needs to be approved by the House of Representatives, it being understood that the Premier is responsible for the appointment of his own colleagues. If so, Parliament is in no position to judge

of the fitness or incompetence of the personnel of the Cabinet; and, therefore, its only check on that body is a vote of lack of confidence in case it does not approve of the latter's policies. The dissolution of Parliament is intimately bound up with the question of adverse vote; accordingly, such a vote will not be lightly entertained. Moreover, a vote of lack of confidence may refer only to a particular policy of a particular department, without affecting the other matters or the whole Cabinet.

Finally, out of a total of 599 members present, 445 were in favor of retaining the original article. As this lacked just two votes to constitute the necessary three-fourths, objections were raised against the counting. The question was reversed, and only 98 votes were against the retention. The necessary one-fourth being 149, the original article was considered as passed.

No Administrative Court

(4) The judiciary is to be independent, and the various judicial officers are not to be removable at pleasure (Chapter VIII). We will discuss its powers and limitations later; but here we may note the question of an administrative court. In France, for example, if an official is guilty of an offence in law, he is amenable not, as in England or the United States, to the ordinary courts, like any other ordinary citizen, but to a special administrative tribunal (*tribunal administratif*). This is reproduced in Article 61 of the Japanese constitution (1889) as follows: "No suit which relates to rights alleged to have been infringed by the illegal measures of the executive authorities, and

which should come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognisance of by a court of law."

During the discussions an attempt was made to incorporate a similar clause in the Chinese constitution. Among others it was suggested that as the judiciary and the executive were apt to be at loggerheads with each other, so suits affecting the administrative acts of officials might not be decided impartially by an ordinary court of law. Besides, the latter is in no position to appreciate the attitude of the public officers, and an act commendable in itself in the interests of the state, may appear at law to be worthy of condemnation. This amendment was strenuously resisted on the ground that such a court, or *P'ing Chêng Yuan*, would tend to destroy the equality in law of all citizens within the Republic, and create a more privileged position for the officials. If so, the contemplated court would function under a constant cloud of suspicion that, being in constant touch with administrative officers, it would be partial towards its special clients, and therefore private citizens suing public officers therein would not get much satisfaction therefrom. Then the amendment was voted upon but defeated, and the original article was retained.

Accordingly, the *droit administratif* is not recognised and administrative suits, as well as ordinary private suits, are triable by any court of law. The only exception occurs where the Constitution itself has established a different procedure. For example, when

the President or Vice-President of the Republic, or a Cabinet Minister, is impeached by the House of Representatives, the right of trial belongs to the Senate. But the nature of the penalty is to be determined by the Supreme Court.

Provincial Government

(5) By far the most controversial subject is the question of provincial government. For it was over this knotty problem that Parliament was some three or four months back the scene of an undignified scuffle between some of the M.P.'s of the different political parties.

In the draft constitution no provision is made for such a subject, and so it was moved to insert an additional chapter thereto in order to define the status and powers of the various provinces. Against this it was pointed out that, as the whole subject involved a mass of details which could not be elaborated in a haphazard manner, it would require weeks, and perhaps months, before the thing could be put together to be voted upon. The country was getting impatient over the delay in the early completion of the new constitution. Therefore, the question of provincial government should be omitted from the constitution and reserved for discussion until after the promulgation of the permanent Constitution. On the other hand, the supporters of the proposal explained that some such provision must be embodied in the constitution, if the past differences of opinion between the provinces and the central government were to be avoided. Moreover, the constitution is meant to deal only with the

basic principles of provincial government, so the details of the scheme will still have to be worked out subsequently.

When the question was put to vote, no decision was found decisive even after the fifth balloting. Finally, by a majority of 449 out of 490 votes, it was decided to add such a chapter to the constitution, and the Constitution Preliminary Examination Committee was entrusted with the drawing up of the necessary provisions. Up to date the various schemes proposed for this important chapter have amounted to no less than ten, but none, however, has yet been approved. It is now learned on good authority that the latest amendment may eventually be passed. According to the draft of this new amendment, the object of a clear demarcation between the powers of the central government and those of the provinces seems to the admirably achieved. The scheme is decidedly superior to those heretofore advanced, and it is to be hoped that it will soon be approved and incorporated in the constitution.

Amendment to the Constitution

(6) Finally, the constitution is not immutable, but may be amended by Parliament. The established form of government and the sovereignty of the people, however, are not fit subjects for amendment. To start the amendment machinery working, one-fourth of the members in each house must first signify their consent to consider the question of an amendment. Then a two-thirds vote of the members present is necessary before the subject of the amendment can be discussed.

Finally, the two houses meet as a constitution amendment conference, and a three-fourths vote is required before the amendment can be passed. If, however, the same houses are convened for the purpose of interpreting the constitution, or any portion thereof, a two-thirds vote only is sufficient to make a decision.

Now this rule of two-thirds and three-fourths is not very prevalent in the other constitutions of the world. For example, in several states the rule is that a unanimous vote is required before any amendment to the constitution can be passed. But, generally, the rule is for a two-thirds vote only. Article V of the American constitution (1787) and Article 90 of the Brazilian constitution (1891) seem to come nearest to the Chinese rule.

Practice in the United States and Brazil

Thus the former provides as follows:—"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or on the applicatian of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

And the latter:—"The constitution may be amended upon the initiative of the National Congress, or of the legislatures of the states. An amendment shall

be considered as proposed, when introduced by one-fourth, at least, of the members of either house of the national Congress, and accepted, after three discussions, by two-thirds of the votes in both houses of the Congress, or when suggested by two-thirds of the states, in the course of one year, each one of the latter being represented by a majority of the votes of its legislature. The proposed amendment shall be considered approved if, in the following year, after three discussions, it is adopted by a majority of two-thirds of the votes in the two houses of Congress."

At first sight the Brazilian rule does not appear to resemble its Chinese prototype; but it seems that, in actual operation, the same amount of care and deliberation is insisted in both cases. In fact the necessity, in the case of the former constitution, to defer the approval of the amendment to the following year, after the same has already been accepted by a two-thirds vote, entails more deliberation than is vouchsafed in a three-fourths vote in the latter constitution. The constitution is not a thing to be lightly treated or easily altered, and therefore it is but fair to safeguard its integrity by all reasonable precautions.

SECTION II

Rights of Citizens

So much for the fundamentals of the consitution. We will now analyse the rights and duties of citizens. As has already been stated, the fact is expressly mentioned that "the sovereignty of the Republic of China is vested in the entire body of the people." Accordingly, the chapter dealing with the rights and duties of citizens comes as Chapter III, immediately after the two short titles on "Form of Government" and "National Territory."

Equality of Law

(1) To begin with, every citizen has the right to the equality of law, "irrespective of race, class or religion." (We propose not to number these articles, as the new additions agreed upon will necessitate their renumbering in the completed constitution. But in our discussion we will follow the order of the provisions as they are set down in the original draft, so as to preserve their sense of relative importance.)

Practice in the United States, Switzerland and Brazil

In Articles 14 (section 1) and 15 (section 1) of the amendments to the American constitution, adopted in 1790-1870, this principle is expressed as follows:— "All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

The same thing is laid down in the Swiss and Brazilian constitutions succinctly as follows:—"All Swiss are equal before the law. In Switzerland there are neither political dependents, nor privileges of place, birth, person, or family" (Article 4, Swiss 1874). "All persons are equal before the law. The republic does not recognise privileges of birth, or titles of nobility, and abolishes the existing honorary orders, their prerogatives and decorations, and all titles of nobility" (Art. 72, sec. 2, Braz. 1891).

Now this equality of law is express; accordingly the administrative court or *droit administratif* has, as we have already noted, no place in China. There is, however, no provision that the republic will recognise no titles of nobility. For when the Manchus abdicated in 1912, the new Republic guaranteed their favorable treatment. This pledge of favorable treatment, it was at one stage of the discussions suggested, should be embodied in the constitution; but in the end, the proposal was abandoned. The pledge is a formal compact between the republic and the Tsing

House, and therefore is entirely beyond the scope of the constitution. The Manchus, as well as the Mongolians, etc., are free to retain their titles of nobility; but this fact does not confer upon them any special immunity from the equal process of the law.

Chinese Nationality

As to who is a Chinese citizen, there is no such precise definition as in the American constitution, or better still, in Article 69 of the Brazilian constitution. The latter reads as follows:—"The following are Brazilian citizens:

1. Persons born in Brazil, even of a foreign father, if the latter is not residing in Brazil in the service of his country.

2. Children of a Brazilian father, and illegitimate children of a Brazilian mother, born in foreign countries, if they establish their residence in the republic.

3. Children of a Brazilian father residing in a foreign country in the service of the republic, even though they do not acquire a domicile in the republic.

4. Foreigners who, having been in Brazil on the 15th day of November, 1889, shall not have declared, within six months after the constitution comes into force, their desire to preserve their nationality of origin.

5. Foreigners who hold real estate in Brazil and are married to Brazilian women, or have Brazilian children, provided that they reside in Brazil, unless they have declared their intention of not changing their nationality.

6. Foreigners naturalised in any other way."

The document merely says that "all who according to the law are recognised as Chinese, are citizens of the Chinese Republic." Nevertheless, in the light of past experience, it seems that parentage and naturalisation are comprehensive enough tests. Concerning naturalisation, all is smooth sailing, as there are hardly any states who do not allow aliens to naturalise themselves as their subjects. As regards parentage, the Chinese law is distinctly in favor of what is known as the Continental, as contra-distinguished with the Anglo-American rule.

Jus Soli and Jus Sanguini

For example, if a Frenchman is born in England or British territory, he is British by birth, because of the *jus soli*, or law of domicile. But, in the eyes of his own government, he is French if he is born of French parents, because of the *jus sanguinis*, or law of consanguinity. As is inevitable, such opposite doctrines are bound to conflict. Accordingly, under English law, a person of such dual nationality is allowed the option of a choice when he arrives at the age of twenty-one. If within a reasonable period of time after the attainment of his majority, he elects his nationality by birth, he remains an Englishman. But if he chooses instead the nationality of his father, then the *jus soli* has no further application.

Now this conflict of the *jus soli* and *jus sanguinis* is illustrated in the case of the Chinese in the Dutch East Indies. Up to six years ago all Chinese born in Java, etc., were regarded as Dutch by the local authori-

ties, even if they came to China, although they were not entitled to the same privileges and immunities as the local Dutch population. Since the Sino-Dutch consular convention of May 8, 1911, a compromise has been effected by an exchange of notes following the signature of that convention. Accordingly, if a Chinese is born in the Dutch East Indies, he is to be considered as Dutch so long as he remains within Dutch jurisdiction. If he returns to China, the *jus sanguinis* revives *ipso facto*. But should he reside in a third country, he is free to choose whatever nationality he pleases.

Therefore, for the purposes of the constitution, the persons who possess Chinese citizenship are easily ascertainable.

Right of Habeas Corpus

(2) "No citizens of the Republic of China shall be arrested, imprisoned, or detained in confinement, tried or punished or fined, except in accordance with the law. When a citizen is imprisoned or detained in confinement, application may be made to a judicial court for a writ of Habeas Corpus according to law."

Here we have, in a consolidated form, the immortal principles of Article 39 of the English Magna Charta (1215) and, for the first time in a Chinese constitution, also of the Habeas Corpus Act (1679)—the palladium of a citizen's inalienable right to the freedom from illegal arrest or punishment. In the light of present experience, when the accused persons are detained in close confinement for at least two or three weeks before they are tried, one cannot be too sanguine over the hopes which may be legitimately cherished regarding this important right of Habeas Corpus.

Parallel in Brazil

This guarantee of individual liberty is stated comprehensively in the Brazilian constitution as follows:—

"No arrest shall be made, except where the person is taken in the act, without previous indictment, unless otherwise permitted by law, and upon the written order of the proper authority. No one shall be kept in prison without charges having been formally filed against him, except in the cases prescribed by law, nor be taken to prison, or detained there if he will give proper bail, in cases where bail is lawful. No one shall be sentenced, except by a competent authority, and by virtue of a pre-existing law, and in the form prescribed by it. The law shall secure to the accused the fullest defence and all the resources and means essential thereto, including notice of the charge, to be delivered to the prisoner within twenty-four hours, signed by the competent authority, with the names of the accusers and witnesses" (Art. 72, sections 13-16).

"The writ of Habeas Corpus shall always be granted when the individual suffers, or is in imminent danger of suffering, violence or coercion, through illegality or abuse of power" (*Ibid.*, sec. 22).

Meaning of Habeas Corpus Writ.

Now this right of *Habeas Corpus* is, however, not restricted merely to the event "when the individual suffers, or is in imminent danger of suffering, violence or coercion, through illegality or abuse of power." That interpretation is too narrow. For the object of such a writ is to ensure that the accused shall have a speedy trial. The fear of this suffering

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from violence or foul play may hasten the application for the writ, but the purpose of the all important parchment is to prevent a suspected person from being confined or detained without a formal trial, or from being detained as long as the gaolers or prison authorities do not see fit to give him a trial. The writ is a command issued by a competent court to the gaoler that "you have the body (*habeas corpus*) of the accused produced in court to show cause why he was committed to prison," etc. If no proper cause can be shown, then the accused is to be discharged; and if there is cause for a legal commitment, he may be bailed out, provided the offence is one which is not serious and admits of bailment. Such a writ, therefore, is a vital guarantee of personal freedom.

During the discussions of this article, it was suggested that the provision should be worded to read that the application for such a writ—literally, a *Pao Fu Ch'uang* or certificate of protection—may be made twenty-four hours after the commitment of the accused. Finally, it was decided to omit the mention of any time limit from the constitution, as it was felt that details of such a nature could be better left to the ordinary laws governing crimes and offences.

Inviolability of Residence and Correspondence

(3) After the right of personal freedom comes the right to the inviolability of, first, residence and, then, correspondence. The provisions are short and pointed, and such inviolability can in no way be encroached upon except by due process of law.

These provisions are embodied in other constitutions as follows:—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (Art. 4, American amendments). "The house is the inviolable asylum of the person who inhabits it; without his consent no one shall enter it at night, except to aid the victims of a crime or disaster, or during the day, except in the cases and in the manner prescribed by law. The secrecy of correspondence is inviolable" (Art. 72, secs. 11, 18, Brazilian). "The house of every person residing in Chilean territory shall be an inviolable asylum, and may not be entered except for special cause determined by law, and by virtue of an order of the proper authority. Epistolatory correspondence shall be inviolable. No papers or effects shall be opened, intercepted, or searched, except in the cases expressly provided by law" (Arts. 137-138, Chilean 1833).

Freedom of Speech, etc.

(4) Then come various other liberties. All citizens have the right to live where they like, or to remove their residences to anywhere they like. They may engage in any manner or form of trade or occupation, and this liberty shall not be curtailed except in accordance with law. They may form associations or organise peaceable assemblies, and they are entitled to the

freedom of speech, authorship and publication—these are not to be restricted except in accordance with law.

Parallels in Brazil and Mexico

These provisions are embodied in detail in the Brazilian and Mexican constitutions as follows:—"No one shall be forced to do, or not to do, anything, except by virtue of law. All persons shall have the right freely to associate and to meet together without arms, and the police shall not interfere except to preserve public order. The expression of opinion on all subjects, through the press or from the platform, shall be free without subjection to censorship, each one being responsible for the abuses which he may commit, in the cases and in the manner prescribed by law. Anonymous publications shall not be permitted" (Art. 72, secs. 1, 8, 12, Braz.).

"Every one shall be free to engage in any honorable and useful profession, industrial pursuit, or occupation suitable to him, and to avail himself of its products. The exercise of these liberties shall not be hindered except by judicial sentence, when such exercise injures the rights of a third party, or by executive order issued in the manner specified by law, when it offends the rights of society. The expression of ideas shall not be the object of any judicial or administrative investigation, except in case it attacks morality, the rights of a third party, provokes some crime or misdemeanor, or disturbs public order. The liberty to write and to publish writings on any object whatsoever is inviolable. No law or authority shall establish previous censorship, or require authors or printers to give bond, or restrict the liberty of the

press, which shall have no other limits than respect for private life, morality, and the public peace" (Arts. 4, 6-7, Mex. 1857).

Right of Free Assembly

The right freely to associate and to meet together for a lawful purpose is construed most liberally in England. And this because the specific right of free assembly or public meeting is just as unknown to English law as the liberty of the press. "The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B, and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights to C, D, E, and F, and so on *ad infinitum*, lead to the consequence that A, B, C, D, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner."[1]

Meaning of Lawful Assembly.

The assembly must not be for an unlawful purpose. If, for example, its object is to commit a crime by open force, or in some way or other to break the peace, the people therein become at once conspirators, and the meeting an unlawful assembly. Or the manner of

[1] Prof. A. V. Dicey, The Law of the Constitution, 267.

holding the meeting may threaten a breach of the peace on the part of those in the meeting, and therefore "inspire peaceable citizens with reasonable fear." If so, the meeting is also unlawful. For an illustration, we may cite the recent case here in Peking of the attempted coercion of Parliament on the part of a vast mob in front of the Parliament buildings. When this happens, the police can forthwith disperse the meeting, so as to preserve the peace or to prevent the peace from being broken. Hence the provision that the right of free assembly is not to be interfered with except to preserve public order, or in accordance with law.

Nice Points in Law

The foregoing seems fairly straightforward. Now we come to more difficult questions. If the unlawful objects of the conspirators are evident or the element of illegality is apparent, the right of the police to interfere admits of no doubt. Nor is this preventive right of the police open to question, if the participants of the meeting put peaceable citizens in reasonable fear of damage being likely to be done to their persons or property. For example, if the former march together in arms, or if their intention clearly is to provoke, by word or deed, their opponents and excite them to break the peace. But "a meeting, which is not otherwise illegal, does not become an unlawful assembly solely because it will excite violent and unlawful opposition, and thus indirectly lead to a breach of the peace."[1]

Suppose the Confucianists should decide to hold a meeting in Peking, and suppose they know that the

[1] Dicey, *op. cit.*, 269.

Christians are going to prevent them from holding their meeting. Now the meeting of the former is lawful, so long as it is conducted in a lawful manner, and the fact that the latter are determined to commit an illegal wrong by trying to prevent that meeting does not render the former's meeting an unlawful assembly. This is the principle established in an English case, *Beatty v. Gillbanks* (1882)—a principle expressed as follows in a subsequent case by an Irish judge:—"An act innocent in itself, done with innocent intent, and reasonably incidental to the performance of a duty, to the carrying on of business, to the enjoyment of legitimate recreation, or generally to the exercise of a legal right, does not become criminal because it may provoke persons to break the peace, or otherwise to conduct themselves in an illegal way."

English Law and Free Assembly

Of course, if the Confucianists, in the course of their meeting, should use abusive language against the doctrines of Christianity or its founder, then their meeting is not conducted in a lawful manner. They will then be responsible for causing a breach of the peace on the part of the Christians. Suppose, however, that the lawful meeting of the Confucianists does in fact provoke a breach of the peace, and there is no other way to preserve this peace except by dispersing the meeting. If so, the meeting may, it seems, be called upon to disperse by the police, and if the meeting is not dispersed, then it becomes from that moment an unlawful assembly. This can only be justified by the *necessity of the case*. For if the peace can be preserved by not breaking up an otherwise lawful assembly, then

the police should arrest the wrong-doers and protect the Confucianists in the exercise of their lawful rights.[1]

The foregoing is an attempt at summarising the English law on the right of free assembly. Such a right is stated almost laconically in the Chinese constitution. But it seems that when the constitution is interpreted in the administration of the laws, the above principles will not fail to be applied.

Liberty of Conscience

(5) All citizens are entitled "to honor Confucius and believe in other religions. This liberty shall only be limited by law in the interests of the peace and order of the country." Thus is settled the long drawn question whether or not China is to have a state religion, and whether or not Confucianism is to be the basis of ethical culture in the educational system of the country. Such a provision guarantees liberty of conscience, including the freedom to believe in Confucius. Accordingly, those who wish to honor China's great sage can still do so, if they desire so to do.

This right of religious worship is stated most fully, perhaps, in the Dutch (1887) and Swiss (1874) constitutions. Articles 167-173 of the former deal with this subject, the material portions of which are as follows:—"Every person shall be absolutely free to profess his religious opinions, except that society and its members shall be protected against violations of the criminal law. Equal protection shall be granted to all religious denominations in the kingdom. The adherents of the various religious denominations shall all

[1] *Ibid.*, 273-275.

enjoy the same civil and political rights and shall have an equal right to hold dignities, offices, and employments. All public religious worship inside of buildings and inclosures shall be permitted, except that the necessary measures may be taken to preserve the public peace and order. Under the same reservation, public religious worship shall be allowed outside of buildings and inclosures, wherever it is now permitted according to the laws and regulations."

To the above Article 49 of the latter constitution adds the following:—"No person shall, on account of his religious opinion, be freed from the performance of any civil duties. No person shall be bound to pay taxes the proceeds of which are specifically appropriated to the actual expenses of the worship of a religious body to which he does not belong."

Inviolability of Property

(6) A citizen may own any form or manner of property. This right of ownership may not be violated, except by due process of law in the interests of the good of the public. Now the text of the article does not specify the kinds of property to be protected, but says "all property." But in the constitutions of many other countries, the provision is much more detailed.

For example, Article 17 of the Argentine constitution (1860) reads as follows:—"Private property is inviolable, and no inhabitant of the nation shall be deprived of it except by judicial decision founded on law. Condemnation of property for a public purpose shall be authorised by law, and indemnification previously

made.....Authors and inventors shall be the exclusive owners of their works, inventions, or discoveries, for the length of time established by law. Confiscation of property is forever stricken out of the Argentine penal code. No armed body shall make requisitions or demand assistance of any kind."

And Article 72 of the Brazilian constitution is as follows:—"The rights of property shall be maintained in their entirety, and no condemnation shall be made, except from necessity or public utility, and indemnity shall, in such cases, be previously made. Industrial inventions shall belong to their inventors, who shall be protected by a patent granted for a limited time, or rewarded by Congress with a reasonable prize, when it may be expedient to make the invention public property. The exclusive right to reproduce literary or artistic works by the press or by any other mechanical process, is guaranteed to their authors. The heirs of the authors shall enjoy this right for the period which the law shall determine. The law shall also secure the ownership of trade marks" (Secs. 17, and 25-27).

Right of Instituting Legal Proceedings

(7) When a citizen has any grievance to redress, he is entitled to institute legal proceedings therefor before a judicial court. As usual, the provision here is laconic, and for details we need to go to its counterparts in the other constitutions of the world.

The best definition of such a right is contained in Articles 5-8 of the amendments to the American constitution, as follows:—"No person shall be held to

answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy in life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This provision, as interpreted in the light of the practices of Western nations, and that regarding the writ of Habeas Corpus, already discussed, will constitute the surest safeguards of personal freedom.

Other Miscellaneous Rights

(8) In addition, every citizen has the right, unless restricted by law, to petition Parliament or state his grievance. He has the right to vote or be elected, unless the same is curtailed in accordance with law. He is entitled, within the limits of the law, to assume any public offices.

Furthermore, if there are other rights and liberties not enumerated in the constitution, they are not invalid solely because they have not been specifically mentioned. In fact, a new article, inserted between the articles on the inviolability of property and the right of instituting legal proceedings, now declares that all such unenumerated rights and liberties will be recognised, so long as they do not conflict with the spirit of the constitution.

This provision is embodied in the American and Brazilian constitutions as follows:—"The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people" (Art. 9, American amendments). "The enumeration of guaranties and rights made in the constitution shall not exclude other guaranties and rights not enumerated, but resulting from the form of government established and the principles proclaimed by the constitution" (Art. 78, Braz.).

Who May Vote

(9) The question of suffrage, as well as the laws governing the various elections, will no doubt come up for revision when the new constitution is completed. But for our immediate purpose we may note what is the present law as to who may vote and who may be voted for.

According to Articles 4-9 of the election laws of the House of Representatives, promulgated on August 10, 1912, any male citizen of at least twenty-one years of age, who has resided for two years or more in his own electoral district may vote for M. P.'s, if he possesses one of the following qualifications:

"(a) Payment of a direct tax of $2 per annum or upwards.

(b) Possession of immovable property of a value of $500 or upwards (except in the case of Mongolia, Chinghai, and Tibet, where the possession of movable property of this value shall be sufficient to qualify as an elector).

(c) A graduate of an elementary or higher school.

(d) Possession of an education equivalent to clause (c)."

A candidate for election as an M. P. must be at least twenty-five years of age; but candidates from Mongolia, Chinghai, and Tibet must, in addition, possess a working knowledge of the Chinese language.

Who May Not Vote

As to those who may not vote, they are divided into three classes. In the first are those who are disqualified from being electors or candidates for election. Namely:—

"(a) All who have been deprived of their civil rights, and have not been restored to their former state.

(b) All who have been declared bankrupt, and whose bankruptcy has not been rescinded.

(c) All of unsound mind.

(d) Opium smokers.

(e) Illiterates."

In the second, those whose right of voting or being elected is suspended for the period of their disability. Namely:—

"(a) All who are on the active list of the army or navy, or (in time of mobilisation) on the reserve list of either service.

(b) Executive, judicial and administrative, or police officials on the active list.

(c) Monks, priests, and other religious orders."

And in the third, those who are not eligible for election. Namely:—

"(a) Teachers in elementary schools.

(b) Students in all schools and colleges."[1]

Now this may be a long way from the ideal of universal suffrage, but it seems that, according to the existing circumstances of the country, the Chinese suffrage is fairly democratic. The property qualification is only an alternative to the literary test, not compulsory as in many non-republics. In Japan, for example, the voter must pay a tax of ten yen. Moreover, the age limit for voters is lower than in a great many countries; for, in the latter, the limit is from twenty-

[1] The China Year Book, 1913, 411.

three to twenty-five, instead of twenty-one years of age. And the age limit of M. P.'s is correspondingly raised from twenty-five to thirty in not a few countries.

Duties of Citizens

(10) So far we have dealt only with the rights and liberties of citizens. Now we come to their duties and obligations. These are self-evident and scarcely require any discussion. Every citizen has, in the first place, the duty to pay taxes according to law; in the second place, the duty to perform military service according to law; and in the third place, the duty to receive primary education. And, of course, it is implied that he has to discharge his fundamental duty—namely, to obey the laws.

The provisions regarding military service and public education are stated most fully in the Brazilian and Dutch constitutions. Article 86 of the former reads thus:—"Every Brazilian is bound to do military service in defence of the country and of the constitution, in accordance with the federal laws."

Public Education in Holland

And Article 192 of the latter is as follows:—"Public instruction shall be an object of constant care on the part of the government. The organisation of public instruction shall be regulated by law, the religious convictions of everyone being respected. Adequate public primary instruction shall be provided by the government throughout the kingdom. The imparting of instruction shall be free, except that it

shall be under the supervision of the authorities, and that, as far as intermediate and primary instruction is concerned, the teachers shall be subject to examination as to their ability and moral character; all to be regulated by law."

Confucianism and Primary Education

According to the original draft, the provision respecting primary education has an additional clause to the effect that Confucianism shall constitute the basis of ethical culture in the educational system of the country. Since, as we have already noted, Confucianism has failed to be elevated into a state religion, this additional clause is now deleted. When we come to discuss the division of powers between the central government and the provinces we shall return to the subject of public instruction.

SECTION III

The National Assembly

Up to the present we have confined our analysis to the rights of citizens. We will now dissect the constitution respecting the Houses of Parliament. For this purpose we will deal with Parliament, first, in its collective entity, and then in its individual or separate entities. To promote clearness we will, in the present instance, group the subject matter under three sub-headings: (1) Powers of Parliament. (2) Rights of M. P.'s. (3) Rules of Parliamentary Procedure.

Powers of Parliament

The National Assembly (*Kuo Hui*) or Parliament represents the people—the fount of the nation's sovereignty—and so to it belongs the right of legislation. It can, therefore, enact new laws or alter old laws. It can revise the constitution, so long as the limits, which we have already noted, laid down by the constitution itself are not transgressed. And it can even pass resolutions having the force of law. It can initiate law bills, though not money bills, and can make recommendations to the government. It can interpellate the government, or demand that the government shall investigate into the offences of officials and punish the same. It can elect the President and Vice-President of the Republic, or impeach and try either of these dignitaries as well as

any Cabinet minister. It can receive petitions from the people and ventilate their grievances. It is the custodian of the interests of the people and sees to it that their liberties are not denied them or trampled under foot. Its consent must be obtained as to when or how the people's money is to be collected and spent. And when the money is spent, it must see that the same has been properly spent. Finally, when war is to be declared on a foreign state, or treaties are to be concluded therewith, its approval must be secured; otherwise, the acts of state are invalid.

These are the fundamental powers of a Parliament in any constitutionally governed country, and similar provisions may be found in all constitutions, though generally in greater detail than in the Chinese prototype. Here we are taking a bird's-eye view only of Parliament's powers; so we will defer their discussion for the nonce.

Privileges of M.P.'s.

To ensure that members of Parliament may discharge their work effectively, they are entitled to enjoy certain privileges and immunities. These consist of (1) freedom of speech, and (2) freedom from arrest. For it is evident that, were the position otherwise, it would be hardly possible for the legislators to go about their duties efficiently.

As regards the first, the constitution provides that "Members of both houses shall not be responsible outside of Parliament for their expressions and decisions in the house." That is to say, a member

cannot be held responsible outside of Parliament for what he speaks or does inside the house. If the language he uses is improper, or disrespectful, the Speaker of the House, or the President of the Senate, may call him to order; but it is beyond the jurisdiction of the ordinary judicial court to interfere. The privilege, therefore, merely protects a member from external influence or interference, but does not involve an unrestrained licence of speech within the house.

As regards the second, it is laid down that "Members of Parliament shall not be arrested or detained in confinement, unless arrested in the act of committing a crime, or with the approval of the house concerned. When a member is arrested in the act of committing a crime, the government shall report the reason of the arrest to the house concerned. The house may, when it considers the arrest to be unnecessary, call upon the government to liberate the member arrested."

Practice in the United States, France and Brazil

The extent of this freedom from arrest is variously defined in the other constitutions of the world as follows:—"They shall in all cases, except treason, felony and breach of peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same" (Art. 1, sec. 6, American).

"No member of either chamber shall, during the session, be prosecuted or arrested for any offence or

misdemeanor, except upon the authority of the chamber of which he is a member, unless he be taken in the very act. The detention or prosecution of a member of either chamber shall be suspended for the session, and for the entire term of the chamber, if the chamber requires it'' (Art. 14, French 1875).

''Deputies and senators, from the time they have received their credentials until a new election, shall not be arrested or prosecuted criminally without the previous consent of their house, except when taken in the act of committing an unbailable offence. In the latter case the court shall collect all the evidence and submit it to the proper house, which shall decide whether or not an indictment is to be made, unless the accused should prefer to submit to immediate trial'' (Art. 20, Brazilian).

From the circumstances of the case no member of either house can sit concurrently in both houses, or assume any civil or military office at the same time—a disability which seems to hold good in almost every country, except perhaps England and France, etc., where the Cabinet ministers are generally also M. P's.

Rules of Parliamentary Procedure

Parliament has the exclusive right to adopt its own rules of procedure. If a member is recalcitrant or guilty of disrespect, he may be disciplined by his own house. Each house may pronounce upon the qualifications of its members, but matters respecting disputed election returns are reserved for the Supreme Court. The meetings of each house are open to the public, but secret sessions may by held, if necessary.

Before a meeting can be held there must be a quorum of over one-half of the total membership in each house, and the votes of a majority of the members present will constitute a decision unless otherwise established—*e.g.* in the election or impeachment of the Chief Executive, etc. If the votes are equal, the presiding officer has the right to cast his vote on either side. The Parliamentary session begins on August 1 of each year and will continue for four months, or longer if necessary.

These rules of Parliamentary procedure are in vogue in almost every country, the only difference being, perhaps, the date when Parliament shall commence its sessions.

Composition of the Senate

So much for Parliament as a whole. We will now take the two houses individually and see what are the powers of each. Under the present Provisional Constitution the powers of the two houses are not differentiated, but in the new constitution the line of demarcation is clearly defined.

As has already been stated, the Senate is representative of interests rather than of the people at large. According to the present election laws, as promulgated on August 10, 1912, the number of senators totals 274. They are constituted as follows:—

(a) Ten representatives elected by each of the twenty-two provincial assemblies.

(b) Twenty-seven representatives elected by the electoral college of Mongolia.

(c) Ten representatives elected by the electoral college of Tibet.

(d) Three representatives elected by the electoral college of Chinghai.

(e) Eight representatives elected by the Central Educational Society.

(f) Six representatives elected by the electoral college of Chinese resident abroad.

A candidate for the senatorship must be at least thirty years old and also possess the qualifications necessary for election as an M. P. If he represents his fellow compatriots in foreign countries, as well as in Mongolia, Chinghai, and Tibet, he must also be conversant with the Chinese language. In the case of the oversea senators, the election is held here in Peking, each Chamber of Commerce of Chinese residing abroad sending one representative to form an electoral college. And, as already stated, the Senators' term of office is six years, but one-third of the total will retire every two years and new senators elected.

Powers of the Senate

As a joint partner in legislating for the country, the Senate has the right to initiate law bills or concur with those passed by the other house. But a newly-added clause provides that "finance bills directly affecting the financial burdens of the citizens shall first be discussed by the House of Representatives." If the latter sends up a money bill for endorsement, the Senate may propose amendments to the same, but the final say belongs to the House of Representatives. If the Chief Justice of the Supreme Court is to be appointed, the consent of the Senate must be obtained.

If the President, or Vice-President of the Republic, or a Cabinet minister, is impeached by the House of Representatives, it is the Senate which, like the English House of Lords, the French Senate, etc., conducts the trial. If the charges are established, the decision must be registered by a two-thirds vote of the members present. If the President seeks to reinstate an official who has been impeached and convicted, the sanction of the Senate must be obtained. And if the President proposes to dissolve the House of Representatives after it has passed a vote of censure on the Cabinet, the Senate's approval must likewise be secured.

Now these are large powers, but the end is not yet. If the new chapter on the provincial government is accepted, the Senate will occupy a somewhat similar position to that of the Supreme Courts of the United States and other republics in the interpretation of the constitution. Under the above amendment, the powers of the central government and those of the provincial assemblies are clearly marked out. If any doubts should arise as to the precise extent of each body's powers, or if there are any legal conflicts between the provinces themselves, or between the provinces and the central government, it is the Senate which will definitively pronounce upon them. Should a province prove disobedient, or should it act to the prejudice of the whole nation, the President may call upon it to amend its ways. But if these warnings be unheeded, then the President may, with the advice of the Senate, dismiss the provincial governor, and also dissolve the provincial assembly if that body is a party to such unconstitutional conduct.

Moreover, it seems—at this date (June 2, 1917) this point is still unsettled—that the consent of the Senate will also have to be obtained in the appointment of the Chief Auditor of Public Accounts.

The House of Representatives

After the Senate we come to the House of Representatives. Before we discuss its powers, we will note its composition. As already stated, this house represents the people at large, whereas the Senate represents the otherwise unrepresented interests.

According to the regulations for the organisation of the National Assembly, also promulgated on August 10, 1912, one representative will be elected for every 800,000 of the population. Nevertheless, any province with a population of less than 8,000,000 people has the right to return ten members. Pending the taking of a new census, the distribution of the total number of 596 M. P.'s for the various provinces and territories is as follows:—

(A)	Chihli	46	Sinkiang	10	Shantung	33
	Kirin	10	Kwangtung	30	Shansi	28
	Kiangsu	40	Yunnan	22	Kansu	14
	Kiangsi	35	Fengtien	16	Szechuen	35
	Fukien	24	Heilungkiang	10	Kwangsi	19
	Hunan	27	Anhui	27	Kweichow	13
	Honan	32	Chekiang	38		
	Shensi	21	Hupeh	26		
(B)	Mongolia	27				
	Tibet	10				
	Chinghai	3				

The M. P.'s sit for three years and, like the senators, may be re-elected.

Powers of Parliament

Parliament, being the custodian of the people's sovereignty, is recognised as supreme. This supremacy is expressed in (1) the control of the people's purse and (2) general supervision over the executive government. The first is exercised in regard to the annual budget or other money bills, and the second in impeachment as well as a vote of lack of confidence.

Money Bills

The fact that all moneys required in order to carry on the machinery of government must every year be voted by the people's representatives is the most signal proof that "the sovereignty of the Republic of China is vested in the entire body of the people." This does not mean that Parliament is to take the initiative in all financial legislation. That initiative belongs to the executive, but Parliament may give or refuse its assent. This applies to all money bills—whether submitted in the form of a budget, or accounts, or other financial measures. And, as already stated, it is the lower house which has the right first to discuss all "finance bills directly affecting the financial burdens of the citizens."

As regards the budget, the administration will present estimates of one whole year's receipts and expenditures to Parliament within fifteen days of its opening—namely, before August 16, every year. When the lower house has passed the budget, the Senate may propose amendments to the same and request the former to consider its suggestions. If the

former, however, disapproves of the latter's proposals, then the budget as originally passed will stand for the year.

The art of budgeting receipts and expenditures is admittedly difficult. Accordingly, the executive government is allowed much discretionary power in the way of making up the necessary deficiency by spending more than is sanctioned in the estimates as originally passed. But the consent of Parliament to the spending of this excess must be obtained at the beginning of the next session. And if this excess should be incurred, during times of emergency, when Parliament is not sitting and emergency measures are necessary—for example, in the face of an insurrection or a war with a foreign state—then the sanction of Parliament is to be obtained seven days after its next opening.

Board of Audit

As to the actual spending of the money voted by Parliament, all moneys to be issued or expended must first be approved by the Board of Audit. This board will prepare a statement of the actual receipts and expenditures for the past budget year, and the same will be submitted by the government to Parliament for approval.

At the moment of writing it is not yet decided how this board is to be constituted. According to the original draft, the personnel of the board is to be elected by the Senate for a term of nine years, one-third retiring every three years. The chief auditor is to be elected by the members of the board, and his duty is to go before the two houses to make

explanations in connection with the government's report on the annual accounts. But so far the foregoing has not been accepted.

Those who were opposed thereto, contended that in Western countries, an auditor was appointed almost for life, and was well-known for his abilities. If, in China, the auditors were to be chosen by the Senate, they would not, on the one hand, submit to their chief, or, on the other, perform their work conscientiously, but would rather live in constant dread lest they might not be re-appointed next time. But in favor of the original articles, it was pointed out that the object of such a department was to supervise on behalf of the people the proper expenditure by the executive of public moneys. If the auditors were appointed by the government, they could not act independently but must obey their official superiors. Moreover, if the auditors were selected by the Senate, that appointment could scarcely be inferior to one by so small a body of men as the executive. And as regards the retiring of one-third of the auditors every three years, there would always be two-thirds left who could not be described as being unfamiliar with their work.

In addition, there were several other amendments. For example: (1) The chief auditor is to be appointed by the President, but he must be approved by the House of Representatives. (2) The chief auditor is to be elected by the Senate, and he will submit a list of auditors to the President for appointment. The second amendment held the biggest field, and when voted upon, received the support of 306 out of 539 votes. As

this was, however, insufficient to constitute the requisite three-fourths vote, the original scheme was in turn put up for voting. The latter fared even worse, and only 220 votes gave it their adhesions.

This is how the question stands to-day (June 2), and if we may venture a forecast of the ultimate decision, it seems that the above second amendment, or some similiar scheme, will probably be eventually adopted.

Financial Obligations

The powers of Parliament in the direction of finance are, however, not unlimited. The people's representatives may cut down the amount of the budget, but they cannot "make any additions to the annual expenditures." Nor can they turn down every item they deem fit; for it is provided that "unless approved by the government, Parliament shall not abolish or curtail any of the following expenditures:—

(a) Those belonging to the obligations of the government in accordance with law.

(b) That which is necessary for the observance of treaties.

(c) That which is considered necessary in accordance with the provisions of law.

(d) Continuous expenditures."

Now this article is clear in some respects and ambiguous in others. Items (b) and (d), as regards appropriations for the observance of treaties—*e.g.* Boxer Indemnity—and continuous expenditures—*e.g.* annual interest on foreign loans—are obvious enough. Accordingly, during the discussions, the other two

items were vigorously challenged, as the absence of a definite interpretation might give an excuse to unscrupulous persons to create irresponsible expenditures. When the Chairman of the Drafting Committee explained that the first item had special reference to the financial obligations of the government contracted by agreements of all kinds, and that the third was for salaries of officials, the sceptics refused to be convinced. Finally they were satisfied when they were assured that, as all appropriations had to be made in strict accordance with law, no appropriation could be made in violation of the law.

Vote of Censure

So much for Parliament and money bills. As regards Parliament's general supervision over the executive, this right of oversight is exercised by a vote of censure as well as an impeachment. The first deals with the policies of the administration, and the second, the offences of individual members of the executive. The two are effective checks, and serve to emphasise the fact that the republic is, in the phraseology of Lincoln, the world's great democrat, a "government of the people, by the people, and for the people."

Concerning the first, it is laid down that "the House of Representatives may pass a vote of want of confidence in the Cabinet." When this happens, it means that the Cabinet no longer enjoys the confidence of Parliament. The former is considered as unfit to continue in office any longer, and, being unable to secure Parliament's approval of its policies, is therefore

defeated. Accordingly, it should resign and make way for another set of men whom Parliament can trust to resume the administration.

Suppose the Cabinet does not resign, and suppose it maintains that, Parliament being hostile, the latter should be dissolved and a new Parliament convoked, as there are reasonable grounds for supposing that the former's policies will be approved by a new Parliament. Then the constitution provides as follows:—"When a vote of lack of confidence is passed by the House of Representatives, the President shall either dissolve the House of Representatives or dismiss the Cabinet ministers, but the dissolution of the House of Representatives can only be effected with the approval of the Senate."

Dissolution of Parliament

The above is an amended form of the original, which provided that the President could dissolve Parliament with the consent of two-thirds of the senators present in session, but there could be no two dissolutions within the same session. And if Parliament was dissolved, then a new Parliament should be convened within five months from date of dissolution.

Now this provision goes hand in hand with that empowering Parliament to pass a vote of censure on the Cabinet. When the former was discussed, the battle was again of the classic order. Those who were opposed to the idea of dissolution argued as follows:—"As Parliament represents the will of the people, its decision should be final. To question the decision of the House of Representatives by dissolving

it and proceeding with a new election will be contrary to the principle of popular representation. How can a small number of people, as the Cabinet, be allowed to rule arbitrarily over a larger number of people, namely the House of Representatives? Some may say it is a matter of replacing an autocracy of a minority with an autocracy of a majority, but in our opinion an autocracy of a majority is preferable to an autocracy of a minority."

On the other hand, those who were in favor of dissolution, though not as originally contemplated, pointed out that as Parliament could control the government by refusing its assent to pass the budget or, still further, by passing a vote of lack of confidence, etc., the latter should have some effective means to protect itself. For the policy of the government might be perfectly sound, and Parliament might have some other legitimate reason for disagreeing with the government.

Moreover, if the attitude of Parliament was sound, it would undoubtedly be endorsed by their constituents, who would return the old members to the next Parliament. As was explained by Mr. Tang Yi, Chairman of the Drafting Committee:—"The fear that the people are unable to control the government by the return of the M. P".s after the dissolution of the lower house is superfluous. Such an excitement, on the contrary, will give the citizens the necessary political training with the provision for dissolution. And every vote of lack of confidence cast, whether successful or not, will increase the prestige of Parliament, as the vote may cause the dissolution of Parliament and the

sacrifice of the seat of the member who cast the vote. It is, therefore, a real moral test. In France ten Cabinets resigned as the result of interpellations. Such should be the sense of responsibility."

The original article was abandoned, and the amendment as ultimately adopted is what we have already quoted in full. As evidence of the arduousness of the fight over this question, it may be noted that, begun on March 28, no settlement was reached until May 16, after some fifteen meetings. Accordingly, it is further provided that "in assisting the President, the Cabinet ministers shall be responsible to the House of Representatives." Or as the French constitution puts it:—"The ministers shall be collectively responsible to the chambers for the general policy of the government, and individually for their personal acts" (Art. 6, February, 1875).

Impeachment

So far we have been viewing the Cabinet ministers as a collective administrative body. We will now deal with the members of the government individually. If Parliament considers that any one of them is guilty of an offence in law, it may impeach him. In the case of the President or the Vice-President of the Republic, either will be impeached on the ground that he "has committed an act of seditious plotting." But the decision must be concurred in by more than two-thirds of the members present at a meeting having a quorum of more than two-thirds of the total membership of the house. In the case of a Cabinet minister, the impeachment will be based on the fact that he "has

violated the law,'' and the motion of impeachment supported by merely a two-thirds vote of the members present.

''Violation of law'' is a handy, though vague term, for the violation may be a breach of either the constitutional principles or the ordinary statute law. But it was proposed at the discussions that the clause ''bribery or any other act of violation of law,'' might be substituted instead. Against this it was pointed out that bribery could be dealt with in accordance with the ordinary criminal code, and so eventually the original text was retained by 514 out of 597 votes. And as already stated, the impeached officials will be tried by the Senate. We will deal with the question of penalty on the impeachment being established, when we discuss the position of the respective members of the executive.

Rule in America and France

This right of impeachment and the nature of the impeachable offences are stated as follows in the other constitutions:—''The House of Representatives shall . . . . have the sole power of impeachment. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present . . . . The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other

high crimes and misdemeanors" (Art. I, secs. 2-3, and art. II, sec. 4, American 1787).

"The President of the Republic may be impeached by the Chamber of Deputies only, and may be tried only by the Senate. The ministers may be impeached by the Chamber of Deputies for offences committed in the performance of their duties. In this case they shall be tried by the Senate. The Senate may be constituted into a court of justice, by a decree of the President of the Republic, issued in the Council of Ministers, to try all persons accused of attempts upon the safety of the state" (Art. 12, French, July, 1875).

Rule in Brazil

"To the House of Deputies shall belong the initiative in the.....decision of the question whether the President of the Republic should or should not be impeached, under the provisions of Art. 53, and whether the Cabinet ministers should or should not also be impeached for crimes committed by them jointly with the President of the Republic. The Senate alone shall have the power to try and pass sentence on the President of the Republic and the other federal officers designated by the constitution, under the conditions and in the manner which it prescribes. The Senate, when sitting as a court of justice, shall be presided over by the president of the federal Supreme Court. It shall not pass sentence of condemnation unless by two-thirds of the members present.

"The ministers of state shall not be responsible to the Congress or to the courts for advice given to the President of the Republic. They shall be

responsible, however, for their acts which are defined by law as crimes. For ordinary offences and in cases of impeachment they shall be prosecuted and tried before the federal Supreme Court; and for offences committed jointly with the President of the Republic, by the authority competent to pass judgment on the latter.

"After the House of Deputies shall have decided that he should be tried on charges made against him, the President of the United States of Brazil shall be brought to trial and judgment, before the federal Supreme Court in cases of ordinary crimes, and before the Senate in cases of impeachment. After it has been decided that the President shall be tried, he shall be suspended from the exercise of his functions.

"Acts for which the President of the Republic may be impeached are those which are directed against:—

(1) The political existence of the Union.

(2) The constitution and the federal form of government.

(3) The free exercise of political powers.

(4) The legal enjoyment and exercise of political or individual rights.

(5) The internal security of the country.

(6) The honesty of the administration.

(7) The constitutional custody and use of the public funds.

(8) The appropriations voted by Congress" (Arts. 29, 33, secs. 1-2, 52-54, Brazilian 1891).

Approval of Premier's Appointment

In addition to the other checks on the executive which we have already discussed, there is the following provision:—"The appointment of the Premier

shall only be made with the approval of the House of Representatives. If the post of the Premier should be vacated when Parliament is not in session, the President may appoint an acting Premier, but the confirmation of the House of Representatives should be applied for within seven days of the opening of the next session of Parliament."

Now bracket this with the next article, which provides that "Cabinet ministers in assisting the President shall be responsible to the House of Representatives," and we have the supremacy of Parliament established in matters of administration as well as finance.

Under the article, the appointment of only the Premier needs to be approved, not that of all his colleagues. This seems to be a wise measure, although an unsuccessful attempt was made to require that the appointment of all Cabinet ministers, including the Premier, should be approved by Parliament. For example, it was argued, during the discussions, that since Parliament had the right to pass a vote of lack of confidence in the Cabinet, it should be consulted in the formation of that body. But it was pointed out that, since the form of government was that of a responsible Cabinet, the Premier only should be responsible to the lower house. Moreover, there was no precedent to quote to require the approval of all Cabinet ministers, and past experience—*e.g.* during ex-Premier Tuan's term of office—had shown this to be most impracticable. The weight of the logic of facts was recognised, and so all amendments were defeated.

SECTION IV

Powers of the Executive

So much for the powers of the legislature. We will now discuss the powers of the executive, and begin with the election of the President and Vice-President.

Election of the President

As already stated, these are elected by the two houses of Parliament assembled in joint session. The election procedure was adopted, it will be remembered, in October, 1913, before President Yuan Shih-k'ai unseated the Kuo-min-tang members and, in effect, dissolved the National Assembly which had elected him. Accordingly, it is incorporated wholesale into the new constitution as originally passed. So the method of Yuan's election will always be followed.

That is to say, a three-fourths vote of two-thirds quorum of the entire membership is required for a decision. If even after the second ballot, no candidate succeeds in securing the requisite three-fourths majority, then the two who get the highest number of votes will be reballoted, and the one who then gets a vote in excess of one half of the electors present will be considered as elected.

Rule in France

Now this method of election has its counterpart only, perhaps, in France, the constitution of which provides as follows:—"The President of the Republic shall be chosen by an absolute majority of votes of the

Senate and Chamber of Deputies united in National Assembly" (Art. 2, February, 1875). All other republics favor direct election by one form or another of the popular electors.

The constitution of Brazil, however, allows the use of both methods as follows:—"The President and Vice-President of the Republic shall be elected by direct suffrage of the nation and by an absolute majority of votes.....If no one of those voted for shall have received an absolute majority of votes, Congress shall elect, by a majority vote of those present, one of the two persons who has obtained the greatest number of votes in the direct election. In the case of a tie the candidate of the greatest age shall be considered as elected" (Art. 47).

President's Qualifications

As regards qualifications, the President-elect must be a Chinese citizen, in full enjoyment of all his civil rights. He must be at least forty years of age and must have resided in the country for at least ten years.

In the case of the United States, the age-limit is fixed at thirty-five and the years of residence at fourteen (Art. II, sec. 1). In that of Brazil, the age-limit is also fixed at thirty-five, but there is no limitation about the length of residence (Art. 41, sec. 3). In France, however, there is even no age limit, and in Chile the limit is put as low as thirty years of age (Art. 51).

Term of Office

The President's term of office is five years, with the option of re-election for a second term. This is also the rule in Chile, save there is no option for re-election

(Art. 52). In France the rule is seven years *plus* the option of re-election (Art. 2, February, 1875). In the United States and Brazil, it is four years, but in the latter case there is no option for re-election (Art. II, sec. 1, and art. 43 respectively).

And to ensure that there will be no break in the office of the President between the retiring and the new Presidents, the National Assembly will elect a successor within three months before the expiration of the term of the outgoing President.

Oath of Office

Before the Chief Executive assumes office, he must solemnly promise in so many words that he will faithfully obey the constitution and perform his duties as the President of the Republic.

Now this form of oath is common to all republics. For example, in America the oath is as follows:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States" (Art. II, sec. 1). And in Brazil:—"I promise to maintain and execute the federal constitution with perfect loyalty, to promote the general welfare of the Republic, to observe its laws, and to uphold its union, integrity, and independence" (Art. 44).

Office of the Vice-President

The Vice-President is elected in the same manner and at the same time as the President. When the latter vacates his post—*e.g.* on impeachment and conviction, or through death or resignation—the

former will act as President until the expiration of the original Presidential term. And if the latter is prevented from exercising his powers—*e.g.* by illness or absence—the former will also act in his stead. But should the Vice-President also vacate his post, then the Cabinet will administer the government until Parliament elects a new President, which must be done within the next three months.

On the expiry of his term of office, the President's powers come to an end. If by that time the new President has not been elected, or, though elected, does not assume office, the Vice-President shall act temporarily as the Chief Executive. If, however, the Vice-President is also unable to act, then the Cabinet shall assume temporary charge of the government.

It is interesting to note that in China the office of the Vice-President is an independent title, whereas in most republics the Vice-President of the Republic is also the chief senator. For example, Article I, section 3, of the American constitution provides thus:—"The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of the President of the United States." On the other hand, in France and Switzerland, such a dignitary as the Vice-President of the Republic is unknown in their constitutions.

Powers of the President

We now come to the President's powers. Being the Chief Executive of the republic, his powers are chiefly administrative. But in many cases these

powers are more than administrative. In the ordinary case, the President simply concurs with what Parliament or the Cabinet, as the case may be, sees fit to decide. He has no initiative, and his duty is merely to set the government machinery in motion by affixing his seal and signature to the proper document.

But it often happens that the President's office is something more than a mere ornament. In times of emergency, his powers are discretionary, and the fate of an important chapter of the nation's history may hang on his decision one way or the other. Such occasions, it is true, do not occur frequently. The fact, however, that they do occur at all is a reminder that the President is not intended to be a mere figure head, but one who really is a potent influence for good and sheds lustre on his exalted office.

Ordinary Powers

We will commence with the President's ordinary powers. In conjunction with the Cabinet he administers the government. Or, as the constitution puts it:—"The administrative power of the Republic of China shall be exercised by the President with the assistance of the Cabinet ministers." This he does by sealing the documents submitted for his signature by the Cabinet ministers concerned; for, without his seal, the mandate is invalid. Hence it is provided that "the President shall promulgate laws, and supervise and secure the enforcement of the same." And, therefore, "the President, for the purpose of enforcing the law, or in accordance with the power delegated to him by law, may issue mandates (orders)."

When Parliament enacts a measure, the same is to be promulgated within fifteen days after his receipt thereof. The President may veto the enactment and, within the above period of fifteen days, return the same to Parliament for reconsideration, together with the reasons for his decision. If, however, the same legislation is approved by even a bare majority vote—according to the original draft, the vote was two-thirds—in each house, then the same is to be forthwith promulgated. The same rule holds good if, after the expiry of the fifteen days, no request is forwarded by the President to have the bill reconsidered by Parliament. But this does not apply, if the fifteen-day limit should occur when Parliament is either prorogued or dissolved.

Suspension of Parliament

The President convokes and dissolves Parliament. This power, however, in no way infringes upon that of Parliament to begin or adjourn its ordinary daily sessions "on its own accord." For the article which gives that right to the legislature also provides that "special sessions may be held on the following conditions:—(1) By the request signed by not less than one-third of the members of both houses of parliament. (2) By the convocation of the President." Moreover, the Chief Executive may also suspend the sittings of either house; but the suspension is not to exceed ten days, nor can each house be suspended more than once within the same session.

Now this right of suspension of both houses, including the Senate, may appear to be contradictory to the other provision which we have already noted, that

the lower house may be dissolved by the President with the consent of the Senate. In fact, this was so considered by some M. P.'s during the discussions, who thereupon suggested that the words "or the Senate" should not be comprehended within the President's power of suspension. The Chairman of the Drafting Committee, however, explained that in order fully to carry out the spirit of a responsible Cabinet, the Senate should be rendered incapable of obstructing the government, in case the same political party should command a majority in both houses. This explanation was accepted, and it is significant that the original text was adopted by 535 out of 630 votes.

Appointment and Dismissal of Officials

The President appoints or dismisses all civil and military officers, with the exception of those whose appointments are provided by the constitution or statutes. When the Premier vacates his office and Parliament is not in session, the Chief Magistrate can appoint an Acting Premier, but the latter's appointment is to be confirmed by the legislature, as already stated, within seven days after the opening of the next ensuing Parliamentary session.

Now this power of appointing and dismissing all officers of state, save the Vice-President, Chief Justice of the Supreme Court, and others laid down by the constitution and statutes, independently and without the concurrence of Parliament, is in excess of that conferred upon the Chief Executive in many other countries.

Practice in the United States, Argentine and Brazil

For instance, the President of the United States "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." But Congress may by law vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. And "the President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session" (Art. II, sec. 2).

In the case of the Argentine nation, the President may appoint, "with the advice of the Senate, the judges of the Supreme Court and of all other inferior federal courts." And with the same advice, he may appoint and remove all diplomatic agents, as well as all military officers, "when the position to be filled, or the rank to be given, is that of a superior officer in either the army or the navy." But "the ministers of state, officials of the departments, consular agents, and all the government employees whose employment is not otherwise provided for by this constitution," may be appointed or dismissed by the President, independently and "without senatorial action" (Art. 86: 5, 10, 16).

Brazil, perhaps, comes nearest to China; for there the President may "appoint and dismiss at will the ministers of state," as well as members of the diplo-

matic service and consular agents. But the appointments of diplomatic ministers as well as of members of the federal Supreme Court require to be approved by the Senate, and the appointment of the federal judges is conditional upon their nomination by the Supreme Court (Art. 48: 2, 11, 12, 13).

Dissolution of Parliament

So far we have only dealt with the President's administrative powers, pure and simple. We will now discuss his discretionary powers. And the first of these is the dissolution of the House of Representatives with the consent of the Senate.

Here we have the Chief Executive playing the *rôle* of something more than a nominal figurehead. When Parliament has passed a vote of want of confidence in the Cabinet, two courses are offered to the President. Either he will stand by the members of the government, dissolve Parliament and call for a new election, or he will bow to the will of the people's representatives, dismiss the Cabinet and appoint new men in their stead. If he adopts the first alternative, it means that he is of the opinion that the House of Representatives no longer represents the true interests of the nation. The house has ceased to represent the people and so has exhausted the mandate of their electors. This presupposes, of course, that the electors aim always to promote the well-being of the whole country. If he adopts the second course of action, it signifies that he is of the opinion that the Cabinet is not competent to promote the welfare of the people, the

real sovereign of the country, and therefore it is inexpedient to retain its services, however efficient its members may be in other respects.

President's Delicate Task

Accordingly, the decision which the President will make, one way or the other, is full of momentous consequences. Should he have gauged aright the political barometer, the verdict of history will be that he was a wise leader; otherwise, it is difficult for him to escape from imputations, however baseless they may be, reflecting on his impartiality and integrity. This power, therefore, entails grave responsibility and is one which can never be light-heartedly exercised. And when circumstances do arise to compel the making of that decision, the President deserves the support of all who truly love their great heritage. The situation will be delicate, and the man who is to cut the Gordian knot merits the assistance of those who, directly or indirectly, are responsible for placing him in that high pedestal of honor and responsibility.

This right of dissolution is found also in France. Accordingly, it is provided that "the President of the Republic may, with the advice of the Senate, dissolve the Chamber of Deputies before the legal expiration of its terms. In that case the electoral colleges shall meet for new elections within two months, and the Chamber within the ten days following the close of the elections" (Art. 5, February, 1875, and art. 1, August, 1884).

Martial Law and Amnesty, etc.

The President may declare martial law, in accordance with the proper legal requirements, when he deems such is demanded by the circumstances of the

situation. But martial law means the suspension of the ordinary civil courts, and offenders against the law will be amenable to military tribunals. This is a curtailment of the citizens' right to institute legal proceedings in the ordinary civil courts, and such restriction can only be justified by the extreme necessity of the case. For example, when a revolt takes place in a certain district and the ordinary courts are too weak to enforce law and order, military force must be called in. The military tribunal will temporarily enforce law and order, until the uprising is suppressed; then the troops will be withdrawn, and the civil tribunals will function as before.

Military Tribunal

The jurisdiction of a military tribunal is summary, very unlike that of an ordinary prosaic court, and offenders who are convicted will be punished much more severely, and sometimes unceremoniously shot. The situation is critical, and so the measures of precaution must needs be drastic. But the imposition of such a *régime* on the people of that district is no light burden, and this power is one which is liable to be abused. Accordingly, it is provided that "the same shall be withdrawn when it is considered by Parliament to be unnecessary."

The President may, with the consent of the Supreme Court, declare a general amnesty of all offenders, grant a special pardon, commute a punishment, or restore civil rights. But in the case of officials whose rights were deprived as a consequence of their impeachment and conviction, the approval of the Senate, or the body that tried the impeached persons, must be obtained before their rights can be restored to them.

This is the law under the new constitution. Article 40 of the present Provisional Constitution, however, provides differently: The President can exercise the above powers independently, without the concurrence of the Supreme Court. But as regards a general amnesty, the approval of the two houses must be obtained.

Conclusion of Treaties

Finally, the President may, with the concurrence of Parliament, declare war. But in the event of defending the country against foreign invasion, he may first declare war and then ask Parliament to confirm that declaration. He may conclude treaties with foreign nations, but "with regard to a treaty of peace and other treaties affecting legislation, they shall not be valid until the concurrence of Parliament has been secured."

Rule in France and the United States

Now what is meant by "treaties affecting legislation" may be gathered from a corresponding article in the French constitution, which reads as follows:— "The President of the Republic shall negotiate and ratify treaties. He shall give information regarding them to the chambers as soon as the interests and safety of the state permit. Treaties of peace and commerce, treaties which involve the finances of the state, those relating to the person and property of French citizens in foreign countries, shall be ratified only after having been voted by the two chambers. No cession, exchange, or annexation of territory shall take place except by virtue of a law. The President of the Republic shall not declare war without the previous consent of the two chambers" (Arts. 8-9, July, 1875).

In the United States a similar rule obtains, although worded differently. It is the Congress, not the President, who declares war. But the latter "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur" (Art. I, sec. 8, and art. II, sec. 2).

Obsolete Powers

Before we pass on to discuss the personal status of the President, we may note that under the new constitution two powers are now obsolete. Namely, (1) emergency mandates and (2) insignias of honor.

As regards the first, the original draft provides that the President may issue special mandates, which shall have the force of law, for the maintenance of peace and order and prevention of extraordinary calamities when Parliament cannot be immediately convened. These mandates will be submitted to Parliament for confirmation within seven days after the opening of the next ensuing session; but they will be void and invalid, if they fail to secure Parliament's approval.

Emergency Mandates

Now, with the experience of the country under the administration of the last Dictator-President still fresh in their memory, the members raised strong objection to giving such large powers to the Chief Magistrate. It was pointed out that, if adopted, this article would enable any government to destroy the judiciary, and indirectly also the legislature, by means of these mandates. The declaration of martial law or a state of siege, which we have already discussed,

would be sufficient to enforce law and order even in times of extraordinary circumstances; so the proposed article was superfluous. And if such calamities as earthquakes and floods should occur, the enforcement of martial law could be supplemented by financial appropriations. Besides, the original chapter on the Parliamentary Committee had already been rejected by the Conference, and there was none to keep a strict watch over the proceedings of the government. Accordingly, it was highly dangerous to invest the government with unlimited powers, and the life and property of the citizens would be at the mercy of the government.

Legality versus Illegality

Finally, one member said:—"You cannot make an act legal by breaking the law. The law says that only Parliament can make laws, and yet you want the government to issue orders having the force of law. The subsequent cancellation of the same by Parliament will not be a sufficient remedy, for the reason that nothing can undo a wrong which has been imposed on a helpless people by an arbitrary government."

So it was proposed to cancel the article in question. Those who supported the original provision made but a feeble defence. For example, one member observed, amidst loud laughter, that "as the President is elected by the people, it seems unnatural that he will do anything harmful to the people themselves."

Then the question was put to vote. Out of 593 members present, 331 were in favor of its cancellation, but when the original article was put to vote, its supporters numbered only 228—the requisite three-fourths

majority in each case being 444. The latter thereupon suggested that the subject should be referred once more to the preliminary examination committee, who had already rejected the same, for reconsideration. This was a favourite device to gain time; so when the motion was put whether or not the article should be so referred, the same 331 who had already voted for the cancellation of the whole article now voted solidly against it. As it required only 293 votes to defeat the motion, the same was regarded as lost, and the offending article was thus ruled out of the constitution.

Insignias of Honor

As regards the second obsolete power, the original draft provides that "the President shall confer insignias of honor." This clause was also vigorously attacked. Those who wanted to see it expunged from the constitution pointed out that an insignia of honor was a means by which the President might purchase the support of the people. Besides, it was asked: If the United States was able to get along without such honors, why could not China?

But those who favored its inclusion said that the provision was necessary because of the Mongolians and Tibetans, and also the special treatment articles in favor of the Manchus. Then the question was put to vote, but only 94 out of 593 members supported it. Subsequently the motion to refer the subject to the preliminary examination committee was also rejected. Hence the epitaph "obsolete" over the graves of these powers.

Titles of Mongols, etc.

This deletion respecting insignias, however, does not affect the right of the Mongolian, Tibetan as well as Manchu chiefs and princes to retain their present titles. For it will be remembered that, when we discussed the subject of the equality of law in connection with the rights of citizens, we noted that, unlike the Brazilian constitution, there is no provision in the new constitution declaring that the republic will not recognise any titles of nobility. In fact, during the discussions on this subject, one member suggested that the original article should read instead that "the President shall not confer insignias of honor." This amendment was also rejected, as it was felt that the Mongolians, Tibetans and Manchus would thereby be harshly treated in a non-essential matter.

Accordingly, those who at present possess insignias may keep them, and those who do not, may strive by conscientious labor and solid work to win the various marks of distinction which are accessible to all—*e.g.* Order of Merit, the Chia-ho (generally known as the Excellent Crop, but perhaps better rendered as the Golden Harvest) Decoration, etc. These are not affected by the omission in question, and the President may confer or withhold them at his discretion.

Status of the President

As the Chief Magistrate of the nation the President enjoys the distinction of being officially the premier citizen, or *primus inter pares*. He represents the nation in its diplomatic relations with foreign states.

He appoints the ambassadors, ministers and consular agents accredited to the various countries in treaty relations with the republic. He declares war and negotiates treaties, although in the exercise of these momentous powers he must secure the approval of the people's representatives. He is the commander-in-chief, and so is placed in supreme command of the nation's military as well as naval forces. But he cannot create an army or navy at will; the organisation of such forces "must be fixed by law."

Rule in the United States and Chile

This last is expressed as follows in the American constitution:—"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer, in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment" (Art. II, sec. 2).

Such right of supreme command is generally universal in most countries; but in Chile a slightly different rule obtains. "The special powers of the President shall be.....to command in person, the land and naval forces, with the consent of the Senate, and during its recess, with the approval of the Executive Committee. In such a case the President of the Republic may reside in any part of the territory occupied by the Chilean armies" (Art. 73: 17).

Position of the Military in the Constitution

Here we come upon an up-to-date, vital question: What is the position of the military in the new constitution? Beyond what we have already stated or implied, there is no other mention of them in the whole new charter.

Now troops exist for the defence of the country against foreign invasion or for the suppression of internal rebellion. Beyond this they have no other competent jurisdiction. Their task is to perform their duties and not intermeddle with things outside of their proper sphere. Accordingly, they must obey their superiors, though this obedience is not blind. For the purposes of discipline, obedience is imperative; but in the hands of a commander who is disloyal to the nation, such fidelity may be abused.

Meaning of Obedience

The path of the soldier is, therefore, not an enviable one: If he disobeys his officer, he runs the risk of being court-martialled. On the other hand, if he obeys his superior and, in the course of performing his duty, commits an illegal act—*e.g.* joining to overthrow a properly constituted authority, or government *de jure et de facto*, he runs the greater risk of being tried for high treason. In such a case there can be no question of obedience, and the soldier must exercise his judgment.

This is the English law, as well as that of many other countries. It is embodied in the Brazilian constitution as follows:—"The land and naval forces are

permanent national institutions, intended for the defence of the country from foreign attack and for the maintenance of the laws of the land. Within the limits of the law, the armed forces are from their nature bound to obey their superiors in rank, and to support the constitutional institutions" (Art. 14).

Now in China's new constitution such an explicit statement is lacking; but from the provisions of the constitution as well as the discussions thereof, which restrain and restrict the activities of the military within the narrowest possible limits, it seems that the above healthy principles will also be acted upon in China.

Inviolability of the President's Person

Being the chief representative of the country, the President is entitled to the special privilege of inviolability or immunity from the ordinary process of law. This inviolability is expressed as follows:—"With the exception of high treason, the President shall not be prosecuted for criminal charges before he vacates his office."

Now this right of immunity is no ordinary right, but a special dispensation granted to the premier citizen in virtue of his exalted office. So it is not applicable to even the Vice-President, although an unsuccessful attempt was made at the discussions to confer upon the latter a like status. It was felt that the dispensation was necessary only to aid the chief executive and commander-in-chief of the nation's army and navy in discharging his onerous duties, but the same could not be said of the Vice-President.

In the other constitutions of the world such inviolability is rather implied than expressed. But we see its counterpart in Article 6 of the French Constitutional Law on the Organisation of the Public Powers (February, 1875), which provides as follows:— "The President of the Republic shall be responsible only in case of high treason."

Impeachment of the President

We now come to the final topic in connection with the President's powers—namely, his impeachment by Parliament. "When it is considered by the House of Representatives that either the President or the Vice-President has committed an act of seditious plotting, he may be impeached by the decision of more than two-thirds of the members present at a meeting having a quorum of more than two-thirds of the total membership of the House."

Meaning of "Seditious Plotting"

Now the term "seditious plotting," or treason admits of no precise definition. During the discussions it was suggested that the words "or an offence relating to internal disorder or foreign aggression" might be added after "seditious plotting." For it was pointed out that a President might be a dictator, although not actually a traitor to the nation; so when a dictator tried to disturb the country by fomenting internal or external troubles, he should be dealt with as a traitor. Then it was also suggested that "seditious plotting" might be changed into "treason or bribery." For, as one member put it:— "Bribery has been a curse to Chinese officialdom, and

it is now necessary to stamp it out. This is especially necessary with regard to the President and Vice-President, whether in the form of giving or taking bribes."

On the other hand, those who supported the original draft contended that "seditious plotting" or "treason" was comprehensive enough to embrace all crimes calculated to harm the republic. Besides, the suggested additional clause was highly ambiguous, and, if it were adopted, the President and Vice-President could be impeached for crimes which they had, perhaps, never committed. Ultimately, the amendments were defeated, and the original article was retained by 554 out of 594 votes.

As already stated, when we discussed the powers of the Senate, the right of trial belongs to the Senate. If the impeachment is substantiated, and the conviction is approved by more than two-thirds of the senators present, the guilty President or Vice-President will be dismissed from office: "As to the punishment for his crimes, the same shall be dealt with by the highest judicial court" (Supreme Court). But if the official so convicted were a Cabinet minister, his punishment would be correspondingly harsher, as we shall presently see.

Practice in Other Republics

This right of impeachment and its consequences are variously stated in the other constitutions as follows:—

"The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason,

bribery, or other high crimes and misdemeanors. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law'' (Art. II, sec. 4; art. I, sec. 3, American).

''The House of Deputies alone shall have the right to impeach before the Senate, the President, the Vice-President, the ministers of the executive power, the justices of the Supreme Court, and the judges of the other inferior tribunals of the nation, for malfeasance or crime in the exercise of their functions or for ordinary offences.....The sentence of the Senate shall not extend further than removal of the one impeached from office and disqualification to hold any office of honor, trust, or profit under the nation; but the convicted person shall nevertheless be subject to indictment, trial, and punishment, according to law, by the ordinary courts'' (Arts. 45, 52, Argentine).

''The Senate alone shall have the power to try and pass sentence on the President of the Republic and the other federal officers designated by the constitution .....It shall not impose penalties other than removal from office and disqualification to hold any other office, without prejudice to the action of ordinary justice against the person condemned'' (Art. 33, Brazilian).

''The President of the Republic may be impeached only within the year immediately following the conclusion of his term of office, for all acts of his admini-

stration which may have gravely compromised the honor or the security of the state or have openly violated the constitution.....The minister (or President) found guilty by the Senate shall be tried according to law by the ordinary courts of competent jurisdiction, both for the application of the penalty provided for the offence committed and in order to enforce his civil responsibility for damage or injury caused to the state or to individuals'' (Arts. 74, 89, Chilean).

SECTION V

Powers of the Cabinet

So much for the President and his powers. Now we will examine the Cabinet and its powers.

This body being the actual executive, its powers are naturally large, although its acts to be valid must be endorsed by the President, and the mandates appertaining thereto must needs be sealed and promulgated by him. The Cabinet, being composed of Cabinet ministers, is presided over by the Premier. As we have already seen, the Premier's appointment must be approved by the lower house, but that is all. The Premier having been accepted, he can proceed independently to form his Cabinet to assist the President in administering the government.

The Cabinet draws up bills and submits the same, through the President, to Parliament for consideration and approval. But if a bill has been turned down by one house, it cannot be resubmitted to Parliament during the same session. All Cabinet ministers have the right of entrance into either house to explain matters or policies, but they may send delegates to make the explanations or introduce the bills for them when they are prevented by urgent state affairs from being present in person.

This right is expressed as follows in the French constitution:—"The President of the Republic communicates with the chambers by messages, which shall be read from the tribune by a minister. The

ministers shall have entrance to both chambers, and shall be heard when they request it. They may be assisted, for the discussion of a specific bill, by commissioners named by decree of the President of the Republic" (Art. 6, July, 1875).

Government Delegates

According to the original draft, there is an additional clause which is similar to the French requirement that "the commissioners should be named by decree of the President of the Republic." This clause provides that "such delegates are to be appointed by the President."

But when the article was discussed, the latter clause was regarded as unnecessary. Its cancellation was proposed, and out of 580 members present 420 supported the motion. This number being insufficient to constitute a three-fourths vote, the question was on objection reversed as usual, but only 108 stood up to oppose the proposed cancellation. The latter figure being in turn less than the necessary one-fourth or 145, the registered opposition was considered as inadequate. The offending clause was thereupon deleted.

Financial Appropriations

Parliament votes the money and taxes for carrying on the government, but it is the Cabinet who initiates the money bills. Parliament may itself initate an ordinary law bill, but it cannot initiate a money bill. The legislature may cut down the amount of the budget, but, as we have already seen, there are four items of expenditure which it cannot cut or strike off from the annual estimates. Nor can Parliament "make any additions to the annual expenditures."

Moreover, much discretion is given to the Cabinet to provide for the financial needs of the government. For example, "for special enterprises the government may make continuous appropriations, to be spread over a definite number of years, in the budget." Or, "in order to provide for deficits or expenditures not provided for in the budget, the government may make provision for Contingent Funds in the budget"; but "sums actually spent from the Contingent Funds shall be reported to Parliament at the next session for approval."

Emergency Appropriations

If the budget is not established when the new fiscal year actually begins, "the government shall make monthly appropriations to the amount of one-twelfth of the total expenditures provided for in the budget of the previous year." And, "for the purposes of war with a foreign country or the suppression of internal rebellion (or other extraordinary calamities) at a time when it is impossible to convoke Parliament, the government may make emergency appropriations of money, but the appropriations thus made shall be submitted to the House of Representatives for recognition within seven days after the opening of the next session."

Countersignature of Mandates

Before a Presidential mandate can be issued, it must be countersigned by the Cabinet minister concerned; "but this shall not apply to the appointment and dismissal of the Premier."

This is because the Premier is responsible to Parliament, and so his removal or retention depends on the will of the people's representatives. When Parliament passes a vote of censure on the Cabinet, it means that it is time for the Cabinet to resign and make way for a new set of men with whom Parliament can co-operate. Were it necessary that the Premier should also sign his warrant of dismissal, then he could refuse to sign the mandate. If so, he could never be dismissed, and the *vox populi* would always be thwarted. Above all, the Cabinet need not be responsible to Parliament, and the supremacy of Parliament would prove a mere fiction, an unreality.

Case of Ex-Premier Tuan

This point is important, in view of the recent misconceptions regarding the Presidential Mandate of May 23, 1917, dismissing ex-Premier Tuan Chi-jui, without the latter's countersignature. But a perusal of the Provisional Constitution seems to justify the Acting-Premier, Dr. Wu Ting-fang's defence of the government's action. We may quote from his telegram (May 27) to the provinces, repudiating the alleged illegality in the procedure as actually adopted, which is as follows:—

Acting-Premier Wu's Statement

"Some doubts have been expressed as to the propriety of the Government in issuing the Presidential Mandate dismissing the ex-Premier some days ago without the countersignature of the Premier. It should be remembered that under article 34 of the Provisional

Constitution, the President has the power to dismiss and appoint military and civil officers of the Government. Under article 43 the Premier and the Cabinet Ministers are collectively called the Kuo Wu Yuan (members of the Cabinet). Under article 45, it is provided that the Kuo Wu Yuan shall countersign the legislative Bills submitted to Parliament by the President, the Orders promulgating laws and the ordinary Presidential Mandates when issued. According to the provisions of the article above cited, the Presidential Mandates need only to be countersigned by the Kuo Wu Yuan. There is no special article providing that the Presidential Mandates must be countersigned by the Premier, nor is there any specific provision that a Mandate issued on such an occasion must be countersigned by the outgoing Premier.

Past Precedents

"Past precedents show that on the 17th of the sixth month of the first year of the Republic (June 17, 1912), Lu Cheng-hsiang, Minister of Foreign Affairs, was appointed acting Premier, and the Mandate announcing the appointment was countersigned by Lu Cheng-hsiang. On the 27th of the same month, the acting Premier was allowed to vacate his post, and the Mandate announcing the same was also countersigned by Lu Cheng-hsiang. On the 20th of the 8th month of the 2nd year (August 20, 1913), the Mandate appointing Chao Ping-chun acting Premier was countersigned by Chao Ping-chun. On the 22nd of the 9th month of the same year, the Mandate allowing

Lu Cheng-hsiang to vacate the post of Premier was also countersigned by Chao Ping-chun. On the 12th of the 2nd month of the third year of the Republic (February 12, 1914), the Mandate allowing Premier Hsiung Hsi-ling to vacate his post was countersigned only by the Ministers of the different Ministries, and it bore no signature of either the then new Premier or the outgoing one. These past incidents afford us definite precedents to support the present case.

"The present Presidential Mandate was countersigned by me, Ting-fang. Being the Minister of Foreign Affairs and further appointed acting Premier, my countersignature to the Presidential Mandate admits of no question respecting its validity. There is nothing in conflict with the Provisional Constitution as alleged. The Mandate was issued through me, Ting-fang, who on receipt of it at once handed it over to the Kuo Wu Yuan, and thence to the Bureau of Printing and Engraving for publication, according to the usual procedure. The advance proof sheets of the mandates of the 23rd inst., may be found in the Government Gazette of the date following. The circular telegram which was despatched to announce the dismissal and the appointment by the President's Secretariat was simply to inform the different quarters of the event beforehand.

"There is nothing in connection with the issue of the Mandate which may be regarded as overstepping the limits of power on the part of the Government. I, Ting-fang, am a law-abiding person and shall never commit myself to measures which are regarded as illegal."

Now, under the new constitution, similar disputes can no longer arise. The law is explicit and, therefore, there will be no room for ambiguities or misunderstandings.

Temporary Control of Administration

Finally, when both the President and Vice-President of the Republic should vacate their offices, the Cabinet will assume the sole control of the administration until Parliament shall elect a new President within the next three months. And when the Vice-President cannot act in the place of the new President on the expiry of the term of the outgoing President, either because the new Chief Executive has not yet been elected or because, though elected, the latter cannot yet assume office, the Cabinet will similarly administer the government until the new President is inaugurated.

Responsibility to Parliament

In our previous chapters we have fairly covered the entire field of the subject of the Cabinet's responsibility to Parliament. Here it will suffice to reiterate the situation in a condensed form.

It is the Parliament who approves the appointment of the Premier, and the latter, being responsible for the formation of his Cabinet, is in turn responsible to the people's representatives. As long as the Cabinet enjoys the confidence of Parliament, its policies will be approved or endorsed by that body. But when the confidence of the representatives is once shaken, then it is for the Cabinet Ministers to tender their resignations.

To remain in office, or to attempt to run the government in face of the vote of censure passed by Parliament, is to ignore the law that "in assisting the President, the Cabinet ministers shall be responsible to the House of Representatives." For when Parliament once passes such a vote, it signifies that the body that originally called the Cabinet, through the Premier, into being, now no longer recognises its godchild. It withholds its confidence and refuses all overtures. Under the circumstances, the only dignified thing for the Cabinet to do is to resign *en bloc*, unless the President chooses to dissolve the House of Representatives instead.

This is the practice in France and, *mutatis mutandis*, also in England, where the doctrine of the Cabinet's responsibility to Parliament first originated.

Impeachment of Cabinet Ministers

So much for a vote of censure. We will now discuss the last topic as regards the Cabinet and its powers—namely, the impeachment of Cabinet Ministers.

This impeachment differs from that of the President in two essentials: (1) In point of voting. For in the case of the latter as well as of the Vice-President, we have seen that the decision must be endorsed by more than two-thirds of the members present at a meeting having a quorum of more than two-thirds of the total membership of the lower house. But in that of the former the decision needs to be registered by only a two-thirds vote of the members present. (2) In

point of offence. The President is only responsible for an act of "seditious plotting," his person being inviolable for all other offences. But the Cabinet ministers, as well as the Vice-President, are impeachable for any "violation of law."

Meaning of "Violation of Law"

Now, what will amount to a "violation of law" is not difficult to find out. Both the principles of the constitution and the ordinary laws are known and ascertainable, and a breach of either will come within the ambit of the definition.

This violation, for example, may consist of "offences committed in the performance of their duties" or "attempts upon the safety of the state" (Art. 12, French, July, 1875). Or it may be "treason, bribery, or other high crimes and misdemeanors" (Art. II, sec. 4, American 1787). Further, it may be "acts which are defined by law as crimes," or "offences committed jointly with the President of the Republic" (Art. 52, secs. 1-2, Brazilian 1891).

And, still further, it may be "offences of treason, extortion, misappropriation of public funds, bribery, violation of the constitution, disregard of the laws through failure to execute them, or for having gravely compromised the security or the honor of the nation" (Art. 83, Chilean 1833). And, finally, it may be "ordinary offences committed by them during their term of office, and .....crimes, misdemeanors, or omissions which they may commit in the exercise of their functions" (Art. 103, Mexican 1857).

Here we have the various offences for which ministers of state in other republics are impeachable. These fairly cover the whole ground of impeachable offences and so seem to be included within the four corners of a "violation of law."

Penalty of Impeachment

When the impeachment has been established and the accused minister is convicted, he will be removed from his office "and also deprived of his public rights." And, still further, "if his crime deserves heavier punishment, he shall be tried by the judicial court." Under the President's power of declaring a general amnesty or granting of special pardons, commutation of punishments, or restoration of civil or public rights, the accused may, of course, be pardoned and have his public rights restored to him. But, as already stated, the restoration in such a case must needs be confirmed by the Senate or the tribunal which originally pronounced upon his guilt.

A somewhat similar rule obtains in other countries. In the American constitution as well as that of several other states, this is expressed as follows:—"Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law" (Art. 1, sec. 3, American 1787).

Rule in Chile

In the Chilean charter, however, the provisions on this score are most elaborate. For example, when a minister of state is accused of an impeachable offence, the House of Deputies will appoint a day in the following week for the minister to explain the charges brought against him. After hearing his explanations, the house will deliberate whether or not the charges shall be admitted to examination. If the decision is affirmative, nine members will be chosen from the deputies present, and these will report within the next five days whether or not there is sufficient ground for an impeachment.

The committee presents its report in due time, and then the house will proceed to discuss the charges and hear all who have anything to say on the subject, whether for or against the accused. If, after such discussion, the house resolves to make the impeachment, it will name three of its members to represent it in formulating and prosecuting the charges before the Senate. And as soon as the house so resolves, the impeached minister will be suspended from the exercise of his functions. Such suspension will cease, if at the end of six months the Senate sees fit not to pronounce judgment upon the impeachment.

The Senate, acting as a jury, will then try the minister and decide, by a two-thirds vote of the members present, whether the accused is or is not guilty of the offence or abuse of powers with which he is charged. If the verdict is "Guilty," the minister will at once be deprived of his office. And "the minister

found guilty by the Senate shall be tried according to law by the ordinary courts of competent jurisdiction, both for the application of the penalty provided for the offence committed and in order to enforce his civil responsibility for damage or injury caused to the state or to individuals."

Accordingly, a minister "may be accused by any person on account of injury which he may have suffered unjustly through any act of the ministry. Such complaint shall be addressed to the Senate, and that body shall decide whether or not the charge is well founded." In case the latter does decide that the charge is not baseless, "the petitioner may proceed against the minister before the court of justice of competent jurisdiction."

As regards the time-limit for such impeachment, it is provided that the House of Deputies may impeach a minister while he is in office, or within six months after his retirement. But if the Chilean President is impeached, the time-limit is, it will be remembered, within one-year after the conclusion of his term of office, but not before. And if the impeachment of the accused minister is taken up only after his retirement or resignation, then "during these six months the minister may not absent himself from the republic without the permission of Congress, or during its recess, of the Executive Committee" (Arts. 84-92, Chilean 1833).

SECTION VI

The Judiciary

So much for the legislature and the executive. We now come to the judiciary.

These three constitute what may be called, without irreverence, the doctrine of governmental trinity, or constitutional triumvirate. The phrase may sound clumsy, but it seems capable of being readily understood. For the three must stand or fall together, and one cannot exist without the other in a well-ordered government. The first makes the laws, the second executes them, and the third enforces them.

Any one of the three may, of course, assume the work of another, or even combine the functions of the other two in itself. But then that government will be an autocracy, not a democracy which we are here discussing. For the functions of each are complex and complicated, and properly to discharge the work of one member of this trinity or triumvirate is as much as one can do efficiently, without being burdened with extra, irrelevant duties.

Past experience in other countries has amply demonstrated the matter-of-factness of this political axiom, and China is no exception to the rule. But this trinity or triumvirate of powers has hitherto been ill-defined in this country, and it is only since the establishment of the Republic, six years ago, that any attempt at demarcation has been seriously undertaken.

The existence of an independent judiciary is still in its infancy. This is why under the new Permanent Constitution it should receive all the support it needs and deserves. And, as we shall soon see, this support is ungrudgingly accorded, though we prefer that the provisions are worded in greater detail and explicitness.

Independence of the Judiciary

"Except in accordance with law, judicial officials, while in office, shall not have their emoluments decreased; nor shall they be suspended from their duties or removed from their office. Judicial officials shall not be dismissed from office, except when sentenced in accordance with law or disciplined (by the Commission for the Punishment of Judicial Officials) as the result of offences committed. But this shall not apply when the organisation of the courts is changed or the qualifications of judicial officials altered. The disciplining and punishment of judicial officials shall be fixed by law."

Here we have guaranteed the independence of the judiciary. As long as the judicial officers perform their duties, or do not go beyond their proper sphere of activities, they are not to be removable at pleasure. Nor are they to incur any punishment except in accordance with law. Within the proper limits of the law, they are independent. Their tenure of office is permanent, unless the courts in question are re-organised when they may be transferred to other judicial duties. And if a judge wishes to remain in harness for the whole of his life, no one can say him nay.

Independence of Judgment

This independence of the judiciary, however, means something more than mere independence of tenure. It means also independence of judgment. For, it will be poor justice if a judge is to be dictated to how he should decide a case, or if his decision is to be susceptible to any persuasion from official superiors. Accordingly, it is laid down that "judicial officials shall be independent in conducting trials, and no one whatsoever shall be allowed to interfere."

These principles underlie the proper administration of justice, and hence are found in all countries. For example, the American constitution provides as follows:—"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold office during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office" (Art. III, sec. 1).

Rule in Chile

Perhaps the clearest exposition of this principle is contained in the Chilean constitution, as follows:—

"The power to try civil and criminal cases shall belong exclusively to the courts established by law. Neither Congress nor the President of the Republic shall in any case exercise judicial functions, remove pending cases to a superior court, or revive cases

already decided. Changes in the powers of courts or in the number of their members shall be made only by virtue of law.

"The judges of the superior courts and of the courts of first instance shall hold office during good behavior. Judges of commercial courts, justices of the peace, and other inferior judges shall hold office for a term to be fixed by law. Judges shall not be deprived of their offices, whether they be held for a limited term or for life, except for a cause legally determined. Judges shall be personally responsible for the offences of bribery, failure to observe the laws regulating procedure, and, in general, for any neglect or wrongful act in the administration of justice. The law shall determine the cases and manner in which this responsibility shall be enforced" (Arts. 99-102).

Powers of the Judiciary

Given an independent judiciary—independent both in tenure of office and judgment as well as conduct of trials—the courts of justice are ready to do their allotted work. (It may be pointed out that the order here adopted of treating this subject is the reverse of that set forth in the constitution. For in the latter document the four articles regarding the powers of the judiciary, etc., are placed before the two providing for the independence of the judiciary. But we prefer the present method, because it best emphasises the fundamental fact that the courts cannot properly perform their task unless they are independent.)

"The judicial power of the Republic of China shall be exercised by the courts of justice." That is an expression of the sum total of the powers of the judiciary. Now to descend to details:—"Courts of justice shall attend to and settle civil, criminal, administrative and other cases of law suit, but this shall not apply in cases specially provided for in the Constitution or law."

Here we meet our old friend, the *droit administratif*, again. But its existence as such in China is not recognised, and administrative suits as expressed above, are also amenable to the ordinary courts of justice.

The Supreme Court

The organisation of such courts as well as the qualifications of judicial officials will be fixed by law; but, as we have already seen, "the appointment of the chief of the highest court of justice (Supreme Court) shall be made with the approval of the Senate." All trials will be conducted in public, but "those affecting peace and order and public decency may be held *in camera*."

Moreover, when the Senate has found the President or Vice-President of the Republic guilty of the charges for which he is impeached by Parliament, the Supreme Court will determine what punishment shall be inflicted on the accused as a result of his crimes. And if the President decides to declare a general amnesty or grant special pardons, commutation of punishments or restoration of rights, the Supreme Court again must first signify its assent

thereto. Of course, if it is intended to restore the civil rights of an official convicted on impeachment, the assent of the Senate, as already explained, must also be obtained.

The Chief Justice

To return to the appointment of the Chief Justice of the Supreme Court.

When the question of the composition of the courts was discussed, an amendment was introduced requiring that the appointment of the Chief Justice should be approved by the Senate. This was vigorously opposed. Its opponents pointed out that the judiciary being independent, its composition should not be interfered with, least of all by a body of the legislature which is dominated by a political party. The judges would be appointed by the Ministry of Justice, not by the Supreme Court, so there was no meaning to require that the appointment of the Chief Justice should be confirmed by the Senate. And if, by so doing, it be intended to safeguard the integrity of the judiciary, then the amendment should go a step further and require that the appointment of all other superior judges be also approved by the Senate.

Appointment by the Senate

On the other hand, its supporters contended that the provisions regarding the judiciary being as fragmentary as those concerning the rights of citizens, the legislature and the executive are extended, the independence of the judiciary must needs be adequately protected. Administrative courts were unknown under

the constitution, and so an administrative suit could hardly be expected to be tried fairly, if the Chief Justice were directly appointed by the Chief Executive. Being the highest judicial court, the *Ta Li Yuan* or Supreme Court was the final legal interpreter of the laws and statutes. If the Chief Justice were to be appointed by the President, then he would be under the influence of the latter—a prospect which could not be said to be very bright for the welfare of the nation.

Ultimately, a vote was taken and the amendment adopted by 469 out of 580 members.

SECTION VII

The Law to be Administered

Finally, as regards the law to be administered, there are three important articles:—"A law shall not be altered or repealed except by another law." "Resolutions passed by Parliament shall have the same force as law." "Laws in conflict with the constitution shall be considered null and void."

The second of these we have already noticed when we discussed the powers of Parliament. It was newly added between the first and third, but only after a hard fight. Those who were opposed to it contended that Parliament should not hold so lightly the power of legislation by abusing it. Parliament was supposed to have the power of supervising the government, but it should not attempt to interfere with the latter's administrative powers.

On the other hand, those who supported the amendment pointed out that it was quite necessary. For, unless a definite meaning was recorded in the constitution regarding the nature and force of resolutions, misunderstandings and disputes would surely arise between the executive and the legislature. This explanation was accepted, and the amendment was accordingly adopted in its present form.

SECTION VIII

Provincial Government

As far as the actual constitution is concerned we have come to the end of our analysis—a process of dissection which leaves no article or clause untouched. But the constitution is incomplete, because the important chapter on provincial government has yet to be added. As to when this will be done, it is at this date (June 9, 1917,) not easy to say. The events of the past fortnight have created a grave political crisis, and the resignations or departures of many members of both houses have destroyed the necessary quorum for resuming the work of the Constitution Conference.

Nevertheless, we may take stock of what remains to be accomplished. As already stated, the different schemes suggested to solve this question of provincial government have amounted to no less than ten. Up to date, however, none has proved acceptable to the conference. From first hand authority it seems that the latest amendment has the greatest chance of success. In fact, it might have been definitely accepted, if the events of the last month or so had not obtruded themselves to upset men's minds. Under the circumstances, we may well analyse this newest scheme of provincial government.

Latest Scheme Proposed

Now, this scheme is drafted by Messrs. T'ang Yi, Chairman of the Drafting Committee, and Ting

Shih-yi, ex-Chief Secretary of the President's Office, and supported by forty-five members. It is divided into fourteen articles, and two of these have each as many as twelve or thirteen sections.

Article I provides that the territorial units shall consist of (1) the province and (2) the district. If the distribution of provinces and districts at present in force is to be altered, the same will be decided by the Senate. But the question of Mongolia, Tibet and Chinghai, as well as other territories which have not as yet been constituted into provinces, will be decided by the National Assembly. And if the latter resolves that these places shall also be so constituted, then the provisions of this new chapter will similarly apply to them.

State Powers

Article II defines the powers of each province as follows:—

(1) To organise the system of administration within the province.

(2) To deal with the public property of the province.

(3) To organise the police force as well as look after the sanitation, waterways, roads, lands and afforestation of the province.

(4) To promote the education and industries of the province, in accordance with the laws of the republic.

(5) To promote navigation or construct telegraphs, either independently or jointly with another province.

(6) To establish a local militia (literally, a Vigilance Force) for the purpose of preserving public peace and order. But the organisation and training, the uniform and equipment of this force must conform to those of the national army.

(a) Except in the case of a war with a foreign country, the President of the Republic shall not call upon any militia to move outside of its own province.

(b) Except in the case of a rebellion, when the military force of the province itself is insufficient to put down the disorder, no province shall call upon the national army for aid.

(7) To provide for the official salaries as well as the expenses of the administration, the militia, etc., out of the receipts of the province. But a province which receives an external subsidy may, with the consent of Parliament, continue to call upon the national treasury for aid.

(8) The following taxes shall be collected by the province:—Land tax, title-deeds tax, licence tax (literally, "tooth-tax"), pawnshops' tax, excise tax, butchers' tax, fishery tax, and "miscellaneous" tax.

(9) To fix the rate of taxation within the province, and also impose an additional tax supplementary to the national tax.

(10) To establish a provincial treasury.

(11) To raise public loans.

(12) To elect the senators to represent the province.

(13) To organise the system of self-government within the districts.

Obligations of Each Province

Article III defines the duties of each province as follows, provided the powers above mentioned are guaranteed:—

(1) To be responsible for a share of the financial burden, in proportion to its resources, when there is a deficit in the national budget, or when appropriations in times of national emergency have to be made.

(2) To obey and observe the laws and statutes of the republic.

(3) To execute an administrative policy delegated by the central government, but expenses so incurred will be defrayed out of the national treasury.

(4) To obey the President's mandate to amend or revoke any provincial legislation which the National Assembly declares is in conflict with the national laws.

(5) To hand over all waterways, railroads and telegraphs to be administered by the central government in times of national emergency.

(6) To amend or nullify any act which, resulting from an abuse or abandonment of the powers appertaining to the province, the Senate declares is detrimental to the interests of the nation.

(7) To abstain from passing any law regarding monopolies, special authorisation, patent right and copyright.

To abstain from printing bank-notes, establishing coinage system, fixing new weights and measures.

To abstain from authorising local banks to act for the national treasury.

To abstain from negotiating with a foreign government regarding the sale of lands, or pledging the mines, railroads and lands of the province as security.

To refrain from constructing naval harbors, arsenals and military depôts.

(8) To report from time to time to the President of the Republic the legislation, the budget, and other matters of the province.

(9) To surrender, in favor of the central government, any right or power which, enjoyed or exercised by the province in the first instance, the Senate declares ought properly to belong to the central government.

(10) To submit to the decision of the Senate in any question of conflict between the province and another province, or between the province and the central government.

(11) The provincial governor to be dismissed, with the assent of the Senate, if the province violates the law or repudiates its duties after being warned by the President of the Republic.

The assembly to be also dissolved if the above unconstitutionality occurs when it is in session.

(12) The President of the Republic to send armed force, with the approval of the National Assembly, to punish the province disobeying or opposing the central government.

Provincial Administration

Article IV provides for the organisation of the provincial government. Each province will have a

governor who will supervise the administration of the province on behalf of the central government. He is appointed by the President of the Republic for four years, and his salary is fixed at $24,000, payable out of the national treasury. The governor is the head of the provincial administration, and so is responsible for the same (Art. V). He is to execute the orders of the central government, and may issue mandates in order to enforce the laws of the province (Art. VI). Each province will establish five public departments: (1) Domestic Affairs. (2) Defence Affairs. (3) Finance. (4) Education. (5) Industry. And each department will be presided over by a chief who is appointed by the governor (Art. VII).

A Miniature Cabinet

The governor will be assisted by an advisory council, who will be responsible to the provincial assembly. This council will consist of (1) the various departmental chiefs, and (2) eight members elected by the provincial assembly. When the council meets to discuss matters, the Chief of the Department of Domestic Affairs will act as the chairman. Such matters as (1) the provincial budget, (2) administrative policies, and (3) the organisation as well as distribution of the militia force, will be decided by the advisory council (Art. VIII).

When a member of the council is impeached by the provincial assembly, the governor will remove him from his office. When the council collectively is impeached, the governor will either dissolve the pro-

vincial assembly or dissolve the advisory council and dismiss the various departmental chiefs. But the provincial assembly cannot be dissolved more than once in the same session. And when the assembly is so dissolved, a new assembly must be convoked within the next two months (Art. IX).

Thus the advisory council system is a reproduction of the larger Cabinet system, with its doctrines of reponsibility to Parliament and dissolution of Parliament.

Provincial Assembly

The composition of the provincial assembly, as well as the regulations governing the election of its members, will be determined by law (Art. X). The following are the powers of this assembly:—

(1) To enact laws in pursuance of the powers conferred upon the province by the constitution.

(2) To pass the budget and accounts of the province.

(3) To impeach the members of the advisory council.

(4) To interpellate or make suggestions to the advisory council.

(5) To elect the senators to represent the province.

(6) To receive and hear petitions from the people (Art. XI).

District Government

The affairs of a district will be administered by a district magistrate. He is appointed by the provincial governor and will hold office for a term of three years (Art. XII).

The magistrate will be selected by civil service examinations held by the central government. One half of those appointed to function in the province will be recruited from the province and the other half, from another province. But those who belong to the province cannot be appointed to a distance nearer than one hundred miles (300 *li*) from their own native districts (Art. XIII).

Thus it is sought to arrive at a compromise between the old rule, which forbids an official to serve in even his own province, and the new which seems to have no fixed policy. This is significant, and seems to be symptomatic of the spirit of compromise which characterises the nation as a whole.

Finally, the organs for the administration and enacting of laws will be determined by law (Art. XIV).

Here we have the sum total of the proposed system of provincial government. In point of comprehensiveness, the above seems to be superior to any yet advanced. It contains almost nothing new, and is rather a consolidation of the principles embodied in the other alternative schemes. But it combines the best and most suitable in those of the others and gives the whole a sense of symmetry and proportion. It is, therefore, hoped that it will soon be incorporated into the constitution.

CHAPTER III

ESTIMATE OF THE NEW CONSTITUTION

Our task of analysing and dissecting China's new constitution is ended. It remains for us to form an estimate of this epochal document.

To begin with, we may note that it is impossible to say exactly what other constitutions China's new constitution is like. For its provisions are drawn literally from the four corners of the globe, and not from only one or two isolated charters. Profiting by the experience of other nations, the makers of this constitution have freely introduced what principles embodied in other constitutions are suitable to thrive on Chinese soil. Therefore, the document is both like and unlike many foreign constitutions. In fact, it may perhaps be described as a veritable Joseph's coat among modern constitutions. And yet, despite this fact, the document is still a Chinese constitution.

Individuality of the Chinese Constitution

The process of borrowing has not been all mere slavish imitation, and multicolored as this constitutional garment is, it has not lost its native hue or twang. For example, and we need not go over the ground already covered, the institution of an independent Vice-President who is not a member of the Senate; the appointment of the Chief Justice of the Supreme Court with the approval of the Senate; the appointment of the

Premier with the approval of the House of Representatives; the constitution of the Senate as a judicial tribunal to try all disputes affecting the provinces and the central government; the very brevity of the various provisions as well as the compactness of the whole document—these and many others are peculiarly indigenous. The constitution is essentially Chinese, not American or French, nor even Brazilian or Chilean, although it bears here and there the well-known hallmark of this or that prototype. The latter fact does not rob it of its element of individuality, but merely shows the universality of the reign of Democracy.

Its Superiority over the Old

In the second place, the new constitution is decidedly superior to all previous attempts. Compared with this, those that have gone before are mere harbingers or preliminary essays. The events of the past few years have demonstrated the weaknesses of the existing charters, and the experience thus gained has been turned to good account. We will cite two instances to illustrate our theme. One relates to the organisation of the cabinet, and the other to a vital phase of the rights of citizens.

As regards the first, the present Provisional Constitution says that the nomination of every cabinet minister needs to be approved by Parliament. This was done. But during the last nine months, Parliament rejected as many nominees as it had approved, and accordingly ex-Premier Tuan Chi-jui's cabinet was handicapped. Under the new constitution, the ap-

pointment of only the Premier, not of the other cabinet ministers, needs to be approved by the lower house. And thus approved, the Premier can pick and choose his colleagues as he pleases, so long as he himself is responsible to the body that has put him in power.

As regards the second, there is the important provision about the writ of *Habeas Corpus* in connexion with the personal right to the freedom from illegal arrest, detention, trial or punishment. Had a similar provision been inserted in the Provisional Constitution, the recent cases of the ex-Minister of Finance and the Editor of the Peking Gazette, who were placed under strict confinement at least two weeks before they were given a trial, would not have occurred.

Differences between the New and the Old

The above examples are concrete and easy to grasp. But there are other important points of difference. These we may tabulate as follows:

Subject Matter	Provisional Constitution	Permanent Constitution
1.—Composition of National Assembly	One-house System	Two-house System

Note: Article 16 of the Provisional Constitution, promulgated on March 11, 1912, provides for only the Ts'an Yi Yuan, which is to be dissolved, according to Article 28, on the convocation of the National Assembly within the next ten months. Parliament was convened, and the Regulations for the Organisation of the National Assembly, promulgated on August 10, 1912, then provide for the two existing chambers—the Ts'an Yi Yuan or Senate, and Chung Yi Yuan or House of Representatives.

2.—Dissolution of Lower House	President has no power	President has power if approved by Senate
3.—Separation of powers between two houses	No separation	Separation clearly defined

4.—Impeachment of President	4/5 quorum and 3/4 vote	2/3 quorum and 2/3 vote
5.—Impeachment of Cabinet Ministers	3/4 quorum and 2/3 vote	Majority quorum and vote
6.—Appointment of Premier	To be approved by both houses	To be approved by lower house only
7.—Appointment of Cabinet Ministers and Ministers abroad	To be approved by Parliament	Need not be approved by Parliament

Note: As a countercheck to the Premier's freedom of action in selecting his colleagues, the required quorum and vote for the impeachment of the Cabinet Ministers is reduced as in (5).

8.—Cabinet	Responsible to both houses	Responsible to lower house only
9.—Provincial System	Unprovided for	Provided for
10.—Board of Audit	Unprovided for	Provided for

Provincial System

But perhaps the most important improvement lies in the proposed incorporation of the provincial system, with its clear-cut demarcation of powers between the central government and the various provinces. This delimitation is a happy solution of the problems which have for so long disturbed the relationships between the two, and it seems that past conflicts will no longer recur under the dispensation of the new constitution, or recur so often as to endanger the necessary political equilibrium for the effective maintenance of law and order throughout the republic.

Division of Powers

As will have been seen from the details of the scheme which we have already noted, the division of powers is on the principle of first the central government and then the provinces. That is to say, certain

specified powers are mentioned as belonging to the provinces, but the residuary powers are vested in the central government—a system which resembles more the Canadian than the American system. And this seems to be amply warranted by the circumstances of the situation.

The system of self-government in this country is but just beginning, and the stage has not yet been reached when the constituent parts of the body politic can with justice be said to be capable of greater powers than are now vouchsafed to them by the new constitution. We have no doubt that that stage of greater efficiency will in course of time be reached; but during this period of slow and tedious evolution, the safest course seems to be rather that of the proverbial tortoise than that of the erratic hare. Just as a moving mass gathers momentum as it courses along through space and, endowed with the resultant inertia, is capable of accomplishing a certain determinate amount of work, so it seems that the provincial system will slowly accomplish the object in view, and when the resultant momentum is all kinetic energy, then the provinces may perhaps be accorded greater powers than now. But Rome is not built in a day, and that will require years of patient and solid work. Under the circumstances, the soundest guiding principle meanwhile is to make haste slowly—*Festina Lente.*

Parallel in Canada

To make this clearer we will cite the practices in other countries. We will first take the case of the Dominion of Canada, which seems parallel to that of

China. Under the British North America Act of March 29, 1867, certain powers are expressed as being accorded to the provincial legislatures; but the Dominion Parliament has the right to exercise the powers "in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces" (Art. 91).

State Powers

The powers so assigned to the provinces are defined as follows:—

"1. The amendment from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of lieutenant-governor.

2. Direct taxation within the province, in order to the raising of a revenue for provincial purposes.

3. The borrowing of money on the sole credit of the province.

4. The establishment and tenure of provincial offices, and the appointment and payment of provincial officers.

5. The management and sale of the public lands belonging to the province, and the timber and wood thereon.

6. The establishment, maintenance, and management of public and reformatory prisons in and for the province.

7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.

8. Municipal institutions in the province.

9. Shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local or municipal purposes.

10. Local works and undertaking, other than such as are of the following classes:

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:

(b) Lines of steamships between the province and any British or foreign country:

(c) Such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.

11. The incorporation of companies with provincial objects.

12. The solemnisation of marriage in the province.

13. Property and civil rights in the province.

14. The administration of justice in the province, including the constitution, maintenance and organisation of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

16. Generally all matters of a merely local or private nature in the province." (Art. 92).

Practice in the United States, etc.

A similar rule—namely, the central government comes first, and then the provinces or states—also prevails in the Commonwealth of Australia, Germany, etc. But in the United States and the South American republics, the converse rule applies—first the provinces and then the central or federal government. Or, as it is expressed in the American constitution:—"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people" (Art. 10, Amendments. Compare Art. 104, Argentine 1860).

Powers Forbidden to the States

The powers forbidden to the states are defined as follows:—

(a) "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

(b) "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or

exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

(c) "No state shall, without the consent of Congress, lay any duty on tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay" (Art. I, sec. 10, American).

Practice in Brazil

In the case of Brazil, the lines of demarcation are expressed as follows: The federal government shall not interfere in matters pertaining peculiarly to the states, except:

"1. To repel foreign invasion, or the invasion of one state by another.

2. To maintain the federal republican form of government.

3. To re-establish order and tranquillity in the states, upon the requisition of their respective governments.

4. To secure the execution of the federal laws and judgments" (Art. 6).

State Powers

Within these limits the states are given the following powers:—

I. The power to levy taxes:

(1) Upon the exportation of merchandise produced in their own territory.

(2) Upon rural and city real estate.

(3) Upon the transfer of property.

(4) Upon industries and professions.

II. The exclusive right to regulate:

(1) Stamp taxes, affecting acts emanating from their respective governments and concerning their internal affairs.

(2) Contributions relating to their postal and telegraphic services.

III. The right to "levy duties on imports of foreign goods, only when such goods are intended for consumption within their own territory, the proceeds of the duty reverting, however, to the federal treasury."

IV. The right to "establish telegraph lines between different points of their own territories, and between these points and those of other states which are not provided with a federal telegraph service, the Union reserving the right to acquire such lines when the general interest may require it" (Art. 9).

Powers Forbidden to the States

The things which are forbidden to the states are as follows:

I. "To tax federal property or revenue or services in charge of the Union" (Art. 10).

II. "To impose taxes on the products of a state or of a foreign country, when in transit through the territory of another state, or when going from one state to another, or upon the vehicles, whether by land or water, by which they are transported."

III. "To establish, subsidise, or interfere with the exercise of religious worship."

IV. "To enact retroactive laws" (Art. 11).

V. "To refuse credit to the public documents of the Union, or of any state, of a legislative, administrative, or judicial character."

VI. "To refuse to recognise the currency, whether coin or paper, put into circulation by the federal government."

VII. "To make or declare war among themselves, or to employ reprisals."

VIII. "To refuse the extradition of criminals requested by the courts of other states, or of the federal district in conformity with the laws of Congress relating to this subject" (Art. 66).

Future Desiderata

So much for the actual merits of the new constitution. It remains for us to look at the other side of the shield. For it cannot be pretended that this document is all perfection and spotless. But in assuming this attitude, we have no wish to play the *rôle* of the carping critic. In fact, one need never indulge in destructive criticisms if one's heart is in the subject, or if one's mind is open to reason. As long as human nature is imperfect, perfection in human affairs is impossible of attainment. The most we can do is to approximate what mathematicians call the absolute quantity. Therefore, admirable as China's new constitution is, it cannot but have its faults or imperfections. And this fact the constitution itself admits, when it provides that the principles it embodies may be amended in accordance with the rules established thereunder.

More Detailed Definition of the Law

To begin with, the document will achieve greater good if, instead of being so compact, it is drawn up in greater detail. And this is especially true of the various important provisions. Such and such a thing cannot be done "except in accordance with law"—a proviso which recurs almost as frequently as the recurring decimal. But the law is incomplete and is still being overhauled in the process of judicial reform. Accordingly, much the better plan will be to establish the law in the constitution itself. The details may be worked out later by Parliament, but the constitution ought to indicate clearly the broad principles for the future guidance of the legislators. Of course, by its very brevity and compactness, the constitution is rendered most flexible and adaptable to the circumstances whenever arising. This flexibility, however, is liable to be misconstrued and erroneously acted upon. Under the circumstances, it is, perhaps, safer to define the law then and there, wherever necessary.

Explicit Protection of the Law

Again—and this is descending into particulars—the provisions in regard to the instituting of legal proceedings may be more lengthy than they are at present worded. From the point of view of the lawyer, the very abruptness of the new provisions in this connexion is disappointing. Now that the republic is definitely committed to a task of reforming its judicial system in accordance with Western standards, it seems highly desirable that the articles concern-

ing legal rights or the redress of grievances should be expressed in greater detail. And this is what occurs in the other constitutions, for the simple reason that a people recently emancipated from the fetters of autocracy and semi-terrorism should know exactly how they stand if they happen to be brought before the law. Such an attitude detracts in no way from the merits of the laws that are to be established or formulated in conformity with the principles of the constitution. But to provide for the fundamentals concerning the universal protection of the law in the constitution is to safeguard twice over what protection will be accorded under the statute law.

Prohibited Punishments

For example, in addition to the writ of *Habeas Corpus*, there should be provisions regarding the kind of punishments which ought never to tarnish the statute book of the republic. To ensure a speedy trial for an accused person, or to protect him from illegal detention or confinement, etc., is insufficient. The constitution ought also to provide that, if a prisoner is to be tried, he has the option to be tried by a jury. Or that "excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (Art. 8, American Amendments). And, as regards the method of conducting a trial, the constitution should certainly taboo any attempt to revive the tortures or other unfair means to extort the prisoner's involuntary confessions. In a word, the constitution should hold up for the public gaze a system of administering the laws which is at once just, unobjectionable, and worthy of an age of progress and civilisation.

Checks on Financial Appropriations

Finally, the provisions regarding the right of financial control by Parliament are not precise enough. According to the new constitution, the moneys required by the executive for the administration of government will be voted by the legislature once a year, and an account of the moneys expended by the Administration will also be submitted to Parliament once a year. That is to say, those who are to spend the money will go to those who are to grant the same only once in twelve months, and the rendering of accounts will also be only once in twelve months. If the budget voted is insufficient to run the government machinery, or any department thereof, the executive may independently appropriate whatever is necessary from a specific sum of money set aside for emergency purposes, known as the Contingent Funds. But the consent of Parliament to the spending of this excess or surplus appropriation must be obtained at the next parliamentary session (impliedly, when the accounts for the last budget year are presented to the people's representatives for approval).

Now this parliamentary control over financial appropriations is insufficient to check any abuses from being committed. It is also provided, it is true, that all moneys to be issued or expended must first be approved by the Board of Audit, and further, the appointment of the Chief Auditor having been approved by the Senate, he is responsible to that body for any leakage of public funds. But all these are methods of cure rather than of prevention. To refuse to sanction the

spending of the surplus expenditure unbudgeted for, or to hold the Chief Auditor responsible for any leakage or misappropriation, is not enough. The money having been spent, or the leakage having occurred, Parliament can only censure the officials concerned or demand their dismissal and, perhaps, also compel the restitution of the public funds wrongly expended or carelessly issued. Suppose these officials are unable to pay; then what will Parliament do?

Prevention better than Cure

At any rate, the prospect is uninviting. The old adage is true here as elsewhere: Prevention is better than cure. The wiser plan is to adopt the English procedure. Namely, to require also that before the Contingent Funds can be touched at all, the consent of Parliament must first be obtained. Or, if the latter is not in session, then that of the Parliamentary Committee is to be secured. This process is but a repetition of the voting on the annual budget, or a mere preliminary thereto, according as the extra appropriation is voted before or after the budget proper. If this extra appropriation is made before the budget, it can be included within the next budget. And if it occurs after the budget, it will of course be reported together with the other appropriations and expenditures in the next rendering of public accounts.

In this way the representatives of the tax-payers are able to keep constant track of their electors' money. If the expenditure is necessary, Parliament can assent to it then just as well as after it is spent. But if the

expenditure is unwarranted, the people's representatives can refuse their assent then and there, rather than find fault with it after it has been expended. The sovereignty of the people is supreme, and this is especially true of financial matters. It is the people who have to pay the taxes and keep the government machinery going; so it is surely their prerogative to say just *when* or *how* their money is to be spent. This is no incursion on the executive's power to initiate financial legislation. It is merely the axiom of popular sovereignty re-illustrated.

Conclusion

We have come to the end of our discussion, and our task is all but done. We have traced the history of constitutional development in China. We have taken the new constitution piecemeal and analysed it article by article. We have also estimated the virtues as well as the weaknesses of this epochal document. And, in so doing, we have compared its provisions with those of other constitutions and seen just in what other democracies they have their kindred spirits.

The task has not been altogether congenial, but like the patient mountaineer climbing up a steep height, our efforts do not go unrewarded. The ascent means arduous toil, but once the summit is reached, we forget all our hardships in the beauties of the panorama which lie spread out before us. For it is only from this vantage point that we can gain an accurate idea of the surrounding country of the whole constitution. Here

we see the winding, rustic paths of constitutional development, and there the farmsteads of the rights of citizens. In the distance we see the more substantial urban-like structures of presidential goverment, cabinet government, the judiciary, and still further we discern the aspiring steeples of Parliament. And above all, though, strictly speaking, fundamentally underlying all, our eyes follow the course of the meandering stream of the Constitution, as it winds in and out of throps and villages, houses and churches, to join the brimming river of Democracy.

Peering into the Future

At the moment of concluding this discussion (June 11) the air is rife with rumors of ominous portents. The present Parliament is to be dissolved by force and a new Parliament will be convened; the Permanent Constitution, which is nearly finished with the exception of a few more articles, is to follow the lead of the M. P.'s that made it, and a new one redrafted. If events will turn out as the seers presage, then it is a thousand pities that, when the *magnum opus* of erecting a new Permanent Constitution is all but completed, the work should be utterly suspended and further progress at the eleventh hour rendered impossible.

The new constitution may not be absolutely perfect, and we have indicated its minor weaknesses. But let him who is without sin cast the first stone. For, when all the factors and surrounding circumstances are considered, it will be admitted that the constitution as completed so far has everything to commend its acceptance. And even if the present Parliament has

not accomplished aught else, the fact that it has made this Permanent Constitution will always be remembered with gratitude by the nation. It may be that a charter to be drawn up *de novo* may be superior, but such a charter is not what rumors say is being aimed at by those who now agitate for the dissolution of the present Parliament. Such dissolution by illegal means of a legally constituted body is itself a bad omen. If so, the outlook for the resultant new charter cannot be reassuring.

As to who is responsible for the present ugly crisis, we prefer to abide by the verdict of posterity. We live in too close proximity to the kaleidoscopic changes of these anxious days, and so our vision is apt to be blurred and indistinct. The impartial onlooker, however, who is separated from these events by the distance of time will no doubt obtain a truer perspective to enable him to form a fairer judgment.

Ordeal of Democracy

Nevertheless, we need not be despondent. The crisis is not unexpected in the inevitable order of natural phenomena. If democracy, so recently emancipated from the shackles of hydra-headed absolutism, or its numerous prototypes, is to survive, its path can not be all strewn with roses. It must, like the growing plant, fight its way through thorns and brambles to gain the greater light and sunshine of liberalism. But liberalism will triumph eventually.

Democracy is like the center of gravity which, distort it how we will, always will recover its true

level. We may not know just what are the obstacles which will have to be surmounted. But this much seems to be vouchsafed to us from past experience. Democracy may be ignored at one moment, or trodden down at the next, but in the end it will come out "top dog." And its perpetual refrain, since the dawn of history, is that of the brook:—

"For men may come and men may go,
But I go on for ever."

PART II

DIPLOMATIC RELATIONS BETWEEN CHINA AND OTHER STATES SINCE AND CONCERNING THE EUROPEAN WAR

PART II

DIPLOMATIC RELATIONS BETWEEN CHINA AND THE POWERS SINCE AND CONCERNING THE EUROPEAN WAR

Since the fateful days of August, 1914, the world around us has undergone upheavals and transformations. The face of Europe, for example, is to-day being distorted, and men now look back upon those days before the war much the same as we are wont to regard the good old days of our fathers and forefathers. The old world-system is fast disappearing, and the factors that once used to count are to-day so many negligible quantities. We no longer speak in terms of pre-war events, and the phrase *status quo ante bellum* can have no meaning in the ultimate settlement of the new world-system that shall emerge from the present ordeal of fire.

To appreciate the world situation as it will be constituted, when the clash of arms shall have ceased, when the foundation of a permanent or, at least, an enduring, peace, shall have been well and truly laid, we need to think in terms, not of the past, but of the future. This process of mental somersaulting

may be difficult and, at times, even confusing, but there is no escape or retreat from it. We must, therefore, accustom ourselves and our ways of thinking to these new factors; for it is only by so comprehending them that we can hope to understand aright the elements which will go to constitute a new world erected on the ruins of the old.

In this general rehabilitation, China is likewise included. In the light of recent events the position she now occupies in the eyes of the world is not the same as that which she used to occupy before August, 1914. The change is welcome, and no sane person will quarrel with it. Its arrival may be belated, but it furnishes a fitting climax to the chapters of events which, begun some eighteen years ago, culminate in those we will here discuss—namely, the diplomatic relations between China and the powers since and concerning the European War.

Such relations may be divided into three main chapters or groups:—(1) War and Neutrality. (2) Breach with Germany. (3) Treaties and Conventions.

CHAPTER I

WAR AND NEUTRALITY

A state of war existed between England and Germany on August 4, 1914, or 11 o'clock in the evening, to be precise. The entry of Great Britain, on the side of France and Russia in defence of Belgium, signified that the area of hostilities would soon be extended. This would mean that the Far East might also be effected. Accordingly, China had recourse to Article III of the 1907 Hague Conventions, No. 1, on the pacific settlement of international disputes. That article provides as follows:—"The contracting powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the states at variance. Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities. The exercise of this right can never be regarded by either of the parties at variance as an unfriendly act."

The government of this country, therefore, attempted to mediate between the belligerent powers, but to no purpose. The former was not unaware that its efforts were doomed to failure; but being a co-signatory of the above Hague convention, it felt that its duty was not discharged until it had acted upon the provision of that article. At this date one may perhaps smile at China's pacifism or aversion to blood-

shed; but, as events soon transpired, this country had good grounds for reminding the belligerents of the existence of an elaborate machinery for the peaceful settlement of international disputes—a machinery which they themselves had sanctioned and helped to erect as a statue to testify that man no longer needed to appeal to the arbitrament of the sword.

Full of perseverance, China next sought the co-operation of both the United States and Japan in an endeavour to localise the theatre of war, or, at least, to prevent the hostilities from being extended to the Far East. This attempt also proved unsuccessful.

Japan and Germany

Soon after, Japan declared that she would respond to the request of the British government and participate in the war in the terms of the 1911 treaty of alliance between the two states. That treaty provides in Articles I and II as follows:—

> "It is agreed that whenever, in the opinion of either Great Britain or Japan, any of the rights and interests referred to in the preamble of this agreement (viz., in Eastern Asia) are in jeopardy, the two governments will communicate with one another fully and frankly, and will consider in common which measures should be taken to safeguard those menaced rights and interests.
>
> "If, by reason of any unprovoked attack or aggressive action, wherever arising, on the part of any other power or powers, either contracting party should be involved in war in defence of its

territorial rights or special interests.....the other contracting party will at once come to the assistance of its ally, and will conduct the war in common and make peace in mutual agreement with it."

On August 15, Japan issued to Germany an ultimatum which expired on the 23rd, "advising" the latter to hand over its armed vessels, as well as the leased territory of Kiaochow, not later than September 15. On August 25 the joint Anglo-Japanese campaign against Tsingtau began, although no serious movement took place until September 3. On the latter date the Japanese landed at Lungkow, so as to besiege the fortress from behind, and on the 21st, the British as well as the Japanese landed at Laoshan Bay. The whole of October was occupied with siege operations, and after a feeble defence, the German garrison capitulated on November 7.

Kiaochow

From this brief recital of facts, several violations of China's neutrality will have become apparent. To begin with, we have a violation in the forcible expulsion of Germany from Tsingtau. It has been suggested that because Germany is the lessee of Kiaochow Bay, so her ejection therefrom is justifiable, and, further, that if China allows the lessee to fortify the place and make use of it as a base of warlike operations against the Allies, the lessor is estopped from impeaching any action the latter powers may employ to reduce their enemy by force of arms.

This attitude presupposes that Germany is the virtual owner of Kiaochow, and therefore Tsingtau, like any other German colony or possession, may be seized. Such a perspective, however, overlooks two vital considerations: (1) the express reservation, under the deeds of conveyance concerning Kiaochow as well as other leased territories, of the lessor's sovereign rights; (2) the fundamental dissimilarity between the right of fortification conferred upon Germany in respect of Kiaochow and that granted to Russia, Great Britain, and France in respect of their leases.

Rights of Sovereignty

As regards the first consideration, the Kiaochow agreement lays down that within a zone of 50 kilometres, or 100 Chinese *li*, surrounding the Bay of Kiaochow, German troops may move freely. But the treaty also provides that, within this zone, the lessor "reserves to himself all rights of sovereignty;" and, therefore, he "reserves to himself the right to station troops within that zone, in agreement with the German government, and to take other military measures." Similarly, in the case of Port Arthur, "the lease is under no circumstances to infringe upon the rights of the Emperor of China as sovereign owner of the territory leased." Moreover, it is further stipulated that, "should Germany at some future time express the wish to return Kiaochow Bay to China before the expiration of the lease, China engages to refund to Germany the expenditure she has incurred at Kiaochow, and to cede to Germany a more suitable

place. Germany engages at no time to sublet the territory leased from China to another power."

Right of Fortification

As regards the second consideration, the convention permits Germany to defend itself against hostile attacks by the erection of fortifications. But these defences are not intended for its sole use; they are designed "at the same time to increase the military readiness of the Chinese Empire." That is to say, when the tenancy expires and the lessee comes to deliver up his possession to the lessor, the place will be equipped with defences for the latter's use and protection.

Now this permission falls short of that granted to the other lessees to maintain such defence works for their exclusive benefit. In favour of Russia, for example, the treaty provides that, "as Port Arthur is solely a naval port.....Russia will herself erect what buildings are required for the naval and military forces, for the erection of batteries or barracks for the garrisons, and generally provide all the funds required." In respect of Wei-hai-wei, "Great Britain shall have in addition the right to erect fortifications, station troops, or take other measures necessary for defensive purposes." And concerning Kwangchow-wan, "France may erect fortifications, place garrisons of troops or take any other defensive measures on the leased land."

In these circumstances, China cannot be estopped from objecting to the violation of her neutrality.

Germany's right of possession or, for that matter, the right of all other lessees, is imperfect. It is valid only for the duration of the lease, at the end of which the property must revert to the grantor. The property is inviolable and, *ipso facto*, clothed with the attributes of neutrality: *Nemo plus juris in alterum transferre potest, quam ipse habet.* As a lessee is not the sovereign of the territory of which he has only temporary possession, he cannot transfer what he has not got. Neutrality is an inherent attribute of sovereignty, and as the sovereignty of a leased territory remains vested in the lessor, that territory remains sacrosanct.

Burlingame Treaty

There is yet another aspect to this important question. From what has already been discussed, it seems clear that a leased territory is also included within the category of tracts of land referred to in Article I of the Sino-American Burlingame treaty of 1868. That article reads as follows:

"His Majesty the Emperor of China, being of the opinion that, in making concessions to the citizens or subjects of foreign powers of the privilege of residing on certain tracts of land, or resorting to certain waters of that Empire for purposes of trade, he has by no means relinquished his right of eminent domain over the said lands and waters, hereby agrees that no such concession or grant shall be construed to give to any power or party which may be at war with, or hostile to, the United States, the right to attack the citizens of the United States or their property within the said

land or waters; and the United States, for themselves, hereby agree to abstain from offensively attacking the citizens or subjects of any power or party, or their property, with which they may be at war on any such tract of land or waters of the said Empire. But nothing in this article shall be construed to prevent the United States from resisting an attack by any hostile power or party upon their citizens or their property.

"It is further agreed that if any right or interest in any tract of land in China has been, or shall hereafter be, granted by the government of China to the United States for purposes of trade or commerce, that grant shall in no event be construed to divest the Chinese authorities of their right of jurisdiction over persons and property within the said tract of land, except so far as the right may have been expressly relinquished by treaty."

Imperfect Ownership

Accordingly, a leased territory gives no right to the party or power hostile to the lessee, to attack the latter within such tract of land or waters. But if the latter is attacked, he may in self-defence resist and repel all attacks by adequate means. In fact, so long as the holding remains within the ownership of the lessor, although the lessee is entitled to its possession for the period of the lease, the latter's rights are imperfect. This right of possession can never be reduced into ownership, and therefore any trespass on the holding, especially *vi et armis*, causing damage to the grantor's property, can not deprive the lessor of his reversionary right.

Of course, if a tenant creates a nuisance on his holding in disregard of the maxim, *Sic utere tuo ut alienum non laedas*, his fellow-tenants may complain to their landlord about its continual existence or request him to have it abated, but they can not trespass thereon and remove the nuisance themselves. To admit the latter act as defensible is to sanction a wrong committed against another wrong—a position manifestly at variance with all good sense.

German Protest

This view of the case is not easy either to state or to follow, but it is even more difficult to put into practice. For, when China protested to Japan against its landing at Lungkow, Germany also protested to China against the Japanese action. The latter declared that it would hold the government of this country responsible for any losses or injuries which would result from the Japanese breach of neutrality.

How Japan answered China's protest will be explained later, but as to Germany's complaint the Peking government replied that Germany had only herself to blame. The territory so leased to her is for peaceful enjoyment, and not for any aggressive purpose. If the lessee makes an improper use of his tenement, the abuse becomes what is known in law as a nuisance, which he is bound to abate or remove. If the nuisance is not abated, its continuance constitutes a breach of the implied covenant for good behaviour or quiet enjoyment. The lessor can at once get the lessee to quit or, if he refuses, forcibly eject him therefrom.

In the present case, the lessor being by force of circumstances precluded from enforcing his own mandate, the law-breaker is estopped from objecting, if his neighbours attempt to abate the nuisance themselves. As regards the defaulting lessee, the title of his possession becomes invalid so soon as he commits a breach of the implied covenant, and it is immaterial to him whether he is ejected by the lessor or by his neighbours. Of course, the lessor is vitally concerned how his quondam tenant is ejected—whether by himself or by a third party. But the tenant is estopped from any right of protest.

A Moot Point

It is understood that Germany, before replying to the Japanese ultimatum, had approached China on the subject of Kiaochow's internment; but as the proposal was accompanied by certain conditions which China had reasons for believing would not be entertained by the Allies, the latter refused the offer. Suppose, however, that the proffer was unconditional, that it was made at the outbreak of the war, and that the offeror also desisted from all warlike preparations calculated to be an alarm or menace to the peace of his neighbours. As then the neighbours had no intention of carrying hostilities so far afield, the absolute reconveyance could not be held to have been effected in order to avoid the consequences of enemy capture. The surrender would be valid, and China would be quite proper in accepting it.

On the other hand, the landlord himself might have forestalled his other tenants' complaint and taken

the necessary steps to abate the nuisance, instead of waiting for the tenants to complain first. As has already been stated, the refusal of Germany to abate the nuisance and his consequent breach of the implied covenant for quiet enjoyment, entitled the lessor to rescind the lease and get him to quit. In the alternative, the former could call in the other tenants to help him remove the nuisance and then authorize them to remain in possession of the holding, until a time should arrive for an equitable settlement between themselves. This would legalize the present *fait accompli*, and the Allies would temporarily look after the property on the landlord's behalf. As it is, however, the status of the occupiers is questionable, and their occupation a violation of China's neutrality.

Lungkow

Now we come to the second violation. When the Japanese landed at Lungkow, they committed another violation of China's neutrality. Lungkow is situated at the northern end of the Shantung peninsula, at the southern end of which Tsingtau is situated. It is some 80 miles beyond the limits of the German leased territory, and so is absolute neutral territory. I say absolute, because just for the sake of argument we may concede for the moment that Kiaochow's neutrality is qualified.

Now if the German invasion of Belgium as a short cut to France is indefensible, then the Japanese landing at Lungkow, in order to march on Tsingtau across the hinterland at the rear, is similarly

indefensible. This is not all, for in the wake of the Japanese march across the promontory from north to south, the local population had to suffer all the rigors and hardships of warfare.

Against this breach of neutrality China protested. Japan replied that as the Germans had made Kiaochow a military base for belligerent purposes and the capture of enemy vessels, they had already infringed the neutrality of this country. If China could not fulfil her duty by protecting her own neutrality, Japan was in her turn released from her obligations to observe it. In other words, China was to blame, all international law or Hague conventions to the contrary. If this line of argument is correct, then Germany is also irreproachable, since Belgium can not prevent her neutrality from being violated.

Writing on the Wall

Here we have a typical illustration of the jibe that international law is only for the states who are strong, and not for those who are weak. This accusation is in some respects difficult to deny, but it is only to be expected, when one remembers that above the independent, sovereign states there is no machinery by which a recalcitrant or law-breaking state can be held to strict account for its misdeeds. As long as human nature remains imperfect, no laws, and least of all, international law, can be perfect. Water cannot rise higher than its source. The remedy lies, however, in educating public opinion and public conscience, so that no law-breakers will ever escape condemnation or punishment.

If we are inclined to shake our heads at the seeming immutable perversity of human nature, we should lift up our eyes and look westward. On the battlefields of Europe, do we not see signs of encouragement? To those states who think they can break all laws with impunity, the vision brooding over those gory fields may well spell the writing on the wall—"Mene, mene, tekel, upharsin." I think it was Lincoln who said that one could cheat *some* men *always*, or *all* men *sometimes*, but not *all* men *always*. Similarly, a state, be it however powerful, may break *some* laws *always;* it may even break *all* laws *sometimes;* but it can never break *all* laws at *all* times. If the present war holds out any hope for humanity at all, surely the one shining hope is that justice, like the centre of gravity, always succeeds in finding its equilibrium. Place it or distort it how we will, it will ever unerringly recover its true position.

"Utmost Diligence"

Nevertheless, to return from our digression, even under the present dispensation of imperfect justice, the weaker states are not without relief. For, against the Japanese rejoinder regarding China's impotence in the protection of her own neutrality, Articles VIII and XXV of the 1907 Hague Conventions, No. 13, may be cited. These articles combined, lay down that a neutral government is only bound "to employ the means at its disposal" to prevent any infractions of its neutrality. That is to say, a neutral is bound to do what he can, and not what it is impossible for him to do. So long as he uses the "utmost diligence"

within his power to prevent any unlawful acts from being committed within his territory or waters, he cannot be charged with negligence or connivance.

Accordingly, unless China can be shown that she has lain supinely on her back, while the Germans were committing various breaches of her neutrality without any shadow of protest on her part, it is unfair for Japan to saddle the responsibility of violation upon China's shoulders. Besides, it is feeble defence to justify one's wrong by quoting a third party's wrong. If two blacks cannot make a white, then no more will two breaches of neutrality make a valid international law.

Shantung Railway

Under the Kiaochow agreement, Germany is given the right to build two railroads from Tsingtau to Tsinanfu. But in the construction of these lines, the convention provides that "Chinese capital may be invested in these (railway as well as mining) operations, and arrangements for carrying on the work shall hereafter be made by a joint conference of Chinese and German representatives." When the Japanese besieged Tsingtau from the hinterland, they got astride of this railway and then seized the terminus at Tsinanfu, which is far away from Kiaochow and situated in the heart of Shantung province. China protested, and Japan justified the seizure on the grounds of German property and military necessity.

Now the claim of German property is untenable, since the line in question is not German government property, but a Sino-German concern. Even if the

proportion of private German capital is such that the line is more German than Chinese, the claim is still invalid, for private enemy property cannot be confiscated. If this is true of property in a territory under the military occupation of an enemy belligerent, such private property is even doubly protected from confiscation when found in a neutral territory. What is more, the belligerent in this case has already violated China's neutrality by occupying its territory, and this not only without its sanction but in spite of its protest. Subsequently it seemed that this claim was never seriously entertained, for when Baron Kato, the Japanese Foreign Minister at the time of the rupture with Germany, was afterwards interviewed on his resignation from office by a deputation of his own countrymen, he admitted that the German title to this railway was doubtful.

"Military Necessity"

But probably the more substantial reason for the seizure is "military necessity." In the words of the Imperial German Chancellor, "necessity knows no law." According to the Japanese General Staff, if the railway is not seized, the enemy may attack the besieger from behind. This is a serious menace to the safety of the besieging force, and therefore its occupation by the enemy is unthinkable. If the siege operations against Tsingtau are not to be interfered with or jeopardised, then it is necessary that the security of the besieging force is safeguarded by adequate means. Accordingly, it is necessary to seize the railway and deprive the enemy of any outside assistance.

Now this may be strategy, but it is not law. For it is just on account of this sort of warfare that

Germany stands condemned in the eyes of the civilized world. It is a crime for Germany to attack France through Belgium, although military necessity dictates that that short road will accomplish the maximum results in the minimum of time. *Mutatis mutandis*, the seizure of the Kiaochow-Tsinan railway is a flagrant violation of China's neutrality.

German Boat

Lastly, we have a fourth case of violation. During the blockade of Tsingtau, a German torpedo boat ran aground on the Chinese coast. Thereupon a Japanese vessel went and captured it. This capture having been effected in waters outside of the limits of the leased territory, China also protested. The seizure took place in neutral territorial waters, and is therefore a direct contravention of Article II of the 1907 Hague Conventions, No. 13, on neutral rights and duties in maritime war. That article provides as follows:— "Any act of hostility, including therein capture and the right of search, committed by belligerent warships in the territorial waters of a neutral power, constitutes a violation of neutrality and is strictly forbidden."

Moreover, the seizure cannot be justified on the ground of continuous chase; for it is established that, as soon as the vessel chased comes within neutral waters, the pursuer must abandon his pursuit. If he continues his pursuit and makes the capture in neutral waters, such seizure is not only invalid, but also a violation of neutrality.[1]

[1] For a detailed treatment of the whole Kiaochow question, see Tyau, *The Legal Obligations arising out of Treaty Relations between China and Other States*, 66-86.

CHAPTER II

BREACH WITH GERMANY

On February 1, the German government announced that its previously declared methods of submarine warfare would from that day commence to take effect. Three days later, the American Minister in Peking, Dr. P. S. Reinsch, notified the Wai-chiao Pu that his government had already severed diplomatic relations with Germany, and requested the Chinese government to follow the United States in its protest. Peking responded and, on February 9, China formally protested to Germany.

China's Protest

The Note declares that "the new measures of submarine warfare inaugurated by Germany, imperilling the lives and property of Chinese citizens to even a greater extent than the measures previously taken, which have already cost so many human lives to China, constitute a violation of the principles of public international law at present in force; the tolerance of their application would have as a result the introduction into international law of arbitrary principles incompatible with even legitimate commercial intercourse between neutral states and belligerent powers." China, therefore, "sincerely hopes that with a view to respecting the rights of neutral states and to maintaining

the friendly relations" between it and Germany, the Berlin government will not carry out its intentions; but, "in case contrary to its expectations, its protest be ineffectual, the Government of the Chinese Republic will be constrained, to its profound regret, to sever the diplomatic relations at present existing between the two countries."

German Reply

On March 10, the German government replied. On that very afternoon Parliament empowered the government to break with Germany; so when the reply was delivered at 9.30 p.m. the same evening, it came too late. On the whole the reply was friendly, though no one expected that Berlin would condescend to listen to Peking.

The Note begins by expressing great surprise that the Chinese protest has been accompanied by a threat: "Many other countries have also protested, but China, which has been in friendly relations with Germany, is the only state which has added a threat to its protest. The surprise is doubly great, because of the fact that, as China has no shipping interests in the seas of the blockaded zones, she will not suffer thereby." To the Chinese allegation that "loss of life of Chinese citizens has occurred as the result of the present method of war," Germany answers that China has never before protested on that score. "According to the reports received by the Imperial Government, such losses as have been actually sustained by Chinese subjects have occurred in the firing line, while they were engaged in

digging trenches and in other war service. While thus engaged, they were exposed to the dangers inevitable to all forces engaged in war." On the other hand, "Germany has on several occasions protested against the employment of Chinese subjects for warlike purposes," and this, Berlin declares, is "excellent proof of its friendly feelings towards China." Therefore, "in consideration of these friendly relations the Imperial Government is willing to treat the matter as if the threat had never been uttered."

As regards the submarine warfare, the reply observes:—"Germany's enemies were the first to declare a blockade on Germany, and the same is being persistently carried out. It is therefore difficult for Germany to cancel her blockade policy." But since the two states are on friendly terms, the Berlin government "is nevertheless willing to comply with the wishes of the Republic of China by opening negotiations to arrive at a plan for the protection of Chinese life and property, with the view that the end may be achieved and thereby utmost regard be given to the shipping rights of China." Then the reply concludes with a veiled threat as follows:—"The reason which has prompted the Imperial Government to adopt this conciliatory policy is the knowledge that, once diplomatic relations are severed with Germany, China will not only lose a truly good friend, but also be entangled in unthinkable difficulties."

German Evasion

This reply is an evasion, a travesty of facts. We are not aware that Chinese labourers going to Europe are made to dig trenches for the Allies or do other war

work. In fact, the laborers recruited from China are employed for non-war work—*e.g.*, in the fields, in the factories, in the mines, etc., to take the place of those who have gone, or who will go, to the war. No doubt many of these labourers are engaged in munition factories. This may be one form of war work, but not the sort which the German reply has in mind, namely, "Chinese in the firing line."

As regards doing war work, the allegation appears to be exaggerated. For example, it is reported that recently the Governor of Canton attempted to prohibit the recruiting of Chinese labour in his province on the part of the Allies, on the ground that such action was a breach of neutrality. He asked the Peking government for instructions, and the latter did not sustain his view. They said that the Allies had given definite assurances that such Chinese labourers would not be given any war work, but would simply be put into occupations left idle by men who have joined the colours or gone to the war. This recruitment is, therefore, not a breach of neutrality, and so no prohibition need be placed on the same, as long as no disturbances to the life and property of the populace are created or apprehended.

In any case, however, the reference to "Chinese in the firing line," even if we concede that the allegation is, though it remains to be, proved, is beside the point. The Chinese losses alluded to in the latter's protest occur on the high seas, as for example, those who work as seamen or firemen on Allied merchantmen, or the 700 odd Chinese labourers who perished

in the French ship "Athos," which was torpedoed in the Mediterranean soon after Peking had protested to Berlin. To try to set off Chinese losses in the firing line against Chinese losses on the high seas is irrelevant. This evidence is unsatisfactory in a court of law. The truth of the matter appears to be that the Berlin government is at a total loss how to meet the charge. For in one breath it says that "China has no shipping interests in the seas of the blockaded zones," and then, in the next, it offers to negotiate with this country, so that "utmost regard be given to the shipping rights of China."

Terminological Inexactitude

When Germany declares that its enemies were the first to declare a blockade, the statement is not accurate. It is a case of terminological inexactitude. In point of fact it was Germany who began the so-called blockade. Shortly after the outbreak of the war, the British government charged the German government with sowing mines indiscriminately in the open sea on the main trade routes, in contravention of the Hague conventions. The former, therefore, declared the "whole of the North Sea as a military area," and also laid mines on a large scale. On February 4, 1915, the Berlin government declared the waters surrounding Great Britain, including the English Channel, to be a war zone, and announced that "on and after the 19th February, 1915, every merchant vessel found in the war zone will be destroyed, without its being always possible to avert the danger to crews and passengers

on that account.'' Against this novel form of blockade England at once retaliated, and by an Order in Council of March 11, 1915, she announced in effect that no ship or goods, enemy or neutral, would be allowed to enter or leave a German port.

In popular language, each of these counter measures is denoted a blockade. This is not strictly accurate, because the technicalities attaching to a legal blockade are absent. What is of importance, however, is this: it was Germany who first sowed mines on the high seas, and in so doing, repudiated what her principal delegate at the second Hague peace conference, Baron Marschall von Bieberstein, had so loudly proclaimed a decade ago before that law-making body. Those remarks will be quoted later. Her violation of international law provoked the British counter proclamation respecting the North Sea, and her declaration of a blockade of the British Isles provoked the British counter reprisal which, in effect, instituted an effective blockade of the whole German Empire, for all possible inlets or outlets through neutral countries, whose frontiers march with hers, have been completely stopped up. Accordingly, it is an error of expression to say that ''Germany's enemies were the first to declare a blockade,'' for Germany can hardly suggest that its declaration of February 4, 1915, is not intended to starve the British population. After all that is the final test of a blockade.

The Rupture

The German reply, therefore, vouchsafes no promise that Berlin will withdraw its illegal methods of warfare. In fact, to quote from China's Note

breaking off diplomatic relations between the two countries, "during the lapse of a month no heed has been paid to the protest of the Government of the Republic in the activities of the German submarines—activities which have caused the loss of many Chinese lives." (The reference here is probably to the 700 Chinese labourers who went down with the "Athos," already cited). The reply is, therefore, "not in accord with the object of the protest; and the Government of the Chinese Republic, to its deep regret, considers its protest to be ineffectual. The Government of the Republic is constrained to sever the diplomatic relations at present existing with the Imperial German Government."

The rupture occurred on March 14, at 12 o'clock noon. The German minister and his staff were handed their passports, and with the consent of the Chinese government, German interests in China are being taken care of by the Dutch Legation until the resumption of friendly intercourse between China and Germany. A foreign consul in China is invested with official duties and so enjoys an official status. He is, therefore, unlike his *confrère* in Western countries, who is a mere commercial agent and has no right of direct official relations with the local authorities. The rupture between China and Germany entails the cessation of all official intercourse, including the administration of the treaty grant of consular jurisdiction over German subjects in this country, and so German consular officers were likewise given their passports. The German guards and garrisons, some

80 in number, have been disarmed, and are now interned opposite the old summer palace, Peking. The German concessions in Tientsin and Hankow have been occupied by Chinese police as well as soldiers, since the official agents of the grantee government have left the country.

Precautionary Measures

So much for German officials and German public property. As regards private German individuals or private German property, these are left unmolested, since a state of war does not yet exist between these two states. Of course they are subject to the territorial government's exercise of precautionary measures which are designed to safeguard the interests of this country. Accordingly, German merchant ships have been taken over, not in confiscation, which right can only be exercised when war is declared, but as a matter of precaution; for the scuttling or destruction of a ship in harbour will impede the channel of navigation and so obstruct the flow of trade. That this salutary measure is timely has since been proved by two of such ships being sunk or scuttled in Woosung and Canton, as well as the discovery of bombs on board for blowing up the vessels or rendering them unfit for navigation.

Moreover, all Germans are required to register themselves and file detailed inventories of their goods and chattels with the local authorities. In addition, they are to provide themselves with identity papers surmounted with their photographs, and report their

movements wherever they go, so that the authorities may keep constant track of all their doings. Of the 219 German employees, those in schools and other non-vital employments are allowed to remain, whereas those in the railways or other important national industries have been dismissed. Those in the customs service drawing a salary below $200 local currency may remain, but those drawing amounts beyond that figure will be relieved.

Present Status of Germans

The question at once arises: What is the present status of Germans in China? Under the treaties, they enjoy the rights of extraterritoriality. That is to say, if they commit any offences in this country, whether against a fellow-German, or a fellow-European, or even a Chinese, they are not triable by the local authorities, but are amenable only to their own consular officers. Since their government is at present *persona non grata* with the territorial sovereign, what is their legal position? The answer is: they are subject to the complete jurisdiction of the Chinese authorities.

This is not because the treaties themselves have been cancelled, for such cancellation or nullification can only occur when a state of war has been formally declared. The true reason is to be sought in the actual facts of the situation. Consular jurisdiction is a right that flows directly from a treaty. It represents a temporary arrangement between the contracting states, whereby one party agrees to delegate or transfer to the other that part of the jurisdiction over the latter's

nationals in its territory which properly belongs to the former. The right is simply a right of delegation and no more. The grant does not mean that the aliens so favoured possess the right of themselves. They enjoy this concession or privilege, not as aliens as such, but only as the subjects of the state which has secured such a delegation of authority by a formal treaty with the territorial sovereign. If their government has not concluded such a treaty with the latter, or in its treaty it has not secured such a grant, then they enjoy no such right and so remain within the jurisdiction of the local authorities.

Treaties in Abeyance

Now the state that has secured such a grant of consular jurisdiction is no longer in diplomatic negotiation with the territorial sovereign. Its treaties are therefore in abeyance, although we cannot say they are abrogated until war is declared. The official agents of the German government have left the country, and there are no officially accredited persons remaining who can administer or exercise such a grant in their place. The Germans in China are, therefore, under the protection and jurisdiction of the territorial authorities.

The grant is personal to the Germans. It cannot be transferred to any third party, although this third party himself may have a similar grant from the territorial sovereign in respect of his own subjects. And since the grantee government has, as it were, ceased to exist, the grant or delegation lapses and reverts to the original grantor or delegator. Under the circumstances, the Germans in China are in the

same position as those aliens whose governments are not in treaty relations with China. They have no one to represent them officially in China, and so are amenable to the jurisdiction of the territorial sovereign.

Dutch Claim

At the present time, however, an attempt is being made by the Dutch Legation who are protecting German interests in China, to claim a right to exercise consular jurisdiction over the Germans in China. Since, as we have already shown, the Germans of themselves possess no longer any right of extraterritoriality, one is at a loss to know how the Dutch claim can be tenable. It is true that the Dutch Legation is the protector of German interests, but such protection does not extend to judicial functions. For if this claim be valid, then certain universally accepted international axioms are at fault.

For example, the treaty grant of extraterritoriality being personal to the grantee government and its subjects, it cannot be transferred or removed except by and with the consent of the grantor. When the latter makes a grant, he makes it to a *persona grata*, not to any Tom, Dick and Harry. If this grantee has misconducted himself and is now *persona non grata*, the grantor surely will not consent to the concession being transferred or delegated to a third party. If the grant is personal, it falls or survives with the person.

Limits to Protection

The protector himself, as in this case, may enjoy a similar grant from the grantor in respect of his own

subjects. But this fact does not warrant him in "assimilating" his *protégés* as his own nationals, or bringing them under his own laws; for it cannot be conceived that the German government will consent to its subjects being made amenable to Dutch laws and Dutch officers.

This was illustrated in 1910, when China attempted to exercise jurisdiction over a Montenegrin subject in Harbin. As Russia was entrusted by the Montenegrin government with the protection of its interests in China, the Russian government objected. It communicated with the United States and suggested that concerted action should be adopted by the powers in Peking on this score. Washington, however, declined the suggestion, and the Department of State observed as follows:— "The position uniformly taken by the Federal government has been that, by consenting to lend its good offices in behalf of subjects of other nations, it could not assume to assimilate such subjects as citizens of the United States and to invest them with extraterritorial rights which they did not enjoy as subjects of the country of their allegiance."

Question of Nationality

Accordingly, there are clearly demarcated limits to the protector's right of protection. A further reason why a protector cannot so assimilate other aliens seems to be one of nationality. For example, if an unknown alien should turn up at the Dutch Legation or consulate and request the latter to declare that he is a German subject, the protector cannot so certify. Not only is he without the means to verify the truth of the statements made before him, but he is also

unauthorized to so act. The fact of nationality is bound up with jurisdiction, and this can only be certified or attested by such person's own proper officials. But once the person in question is provided with the proper papers setting forth his nationality, etc., the protector can then extend his protection to that person.

So to attempt to certify the nationality of such a person is to assert a right to give him a national status, which the protector is clearly unable to do in all good law or sense. If the government of the protected persons cannot consent to the assumption by any other government of jurisdiction over its own subjects, it surely will not concede that the latter may declare any unknown or uncertified person as being one of its subjects. Such matters involve questions of state sovereignty and state rights, and these are too jealously watched and guarded to warrant any outside interference.

Extent of Protection

Under the circumstances, the contention of the Dutch Legation to exercise consular jurisdiction over the Germans at present in China has no leg to stand upon. The protector's right of protection is confined to things which the *protégés* themselves can do or delegate. For example, if the local authorities should require the Germans everywhere to register themselves as well as their property within twenty-four hours (they are actually given from three to ten days), the latter may complain of its stringency and ask for an extension of time. This right of complaint is no legal right. It is a moral right, one connected with considerations of courtesy and humanity. If it is

exercisable by the Germans, it can be delegated or transferred to their protector. This right must of necessity be delegated to their protector, for the simple reason that access to the local government must be had through the intermediary of some friendly official, not private individual. Accordingly, the protector can take up their complaint and communicate with the local authorities so as to secure an amelioration. Similarly, if war is declared between China and Germany, and the Germans are interned, the protector can also exercise his good offices on behalf of his *protégés*, should they be in any way inhumanly treated at the concentration camps, or be denied opportunities for taking healthy exercises.

Law and Humanity

As to the judicial rights of a German in China, only those remain which concern the fundamental principles of humanity. He is no longer amenable to his own officers, nor is he amenable to his protector. Nevertheless, humanity requires that he should be given a fair trial, if he is to be tried by the Chinese judicial officers. This is not because there is anything objectionable in the Chinese administration of justice. It is rather because of the fear of the operation of national prejudices, since the two states are in a state of quasi-belligerency. Here is where the protector can assist his *protégé* in a useful way.

Accordingly, if a German offender be tried by a Chinese court, the Dutch consul may be invited to have a seat in the court. He is there not in any

judicial capacity, but merely as an interested spectator. He will watch and see that his *protégé* is given every facility for a fair trial—*e.g.*, the engaging of counsel and interpreters and the calling of witnesses, etc. If any injustice is done to the accused, his protector can protest and so secure justice for him.

This right of fair trial is a right which inheres in an alien, be he a friendly alien or an alien whose government is *persona non grata* with the territorial sovereign, or even an alien enemy. International law as well as moral law enjoins that every courtesy, every consideration, is to be given to an alien whose government has misconducted itself in the eyes of the territorial sovereign, so long as the same does not affect or prejudice any measure which the latter may adopt in defence of his own vital interests. The giving of a fair trial to such an alien is not concerned with vital interests, so there is no reason to apprehend that it will be denied. If nations must fight, let them fight with clean hands and a clean conscience. In the present case China's protest and rupture are dictated by the desire to maintain the sanctity of international law; so her duty is clear.

Submarine Warfare

We may now pass on to consider Germany's submarine warfare. How far is this warfare legal or illegal? We may dismiss its legality in a few words. Inasmuch as a submarine is an armed vessel, its status resembles that of any other armed vessel. It can, therefore, attack or be attacked by all armed enemy vessels, so long as the laws of civilized warfare are observed.

But an element of illegality enters the moment the submarine meets an enemy merchant vessel and treats it with scant respect. If the submarine, like any other armed vessel, visits the merchantman and examines her for signs of contraband of war, well and good. The vessel may proceed on her voyage if she is innocent, or she may be taken into port, if she is lawful prize. The German submarine commander, however, refuses to exercise any of these legitimate rights. In the words of the German proclamation, "every merchant vessel found in the war zone" (this has been considerably extended since the latest proclamation of February 1, 1917) "will be destroyed, without its being always possible to avert the danger to crews and passengers on that account." This is no empty threat, for numerous merchantmen, both neutral and enemy, have since been torpedoed, often without warning, or, at best, with most inadequate warning, and no attempt was made to rescue the crews and passengers.

Baron Marschall's Boast

Such method of warfare can in no wise be defended, and falls far short of the ideals held forth in the memorable words of Baron Marschall von Bieberstein, the German delegate at the 1907 Hague peace conference. In supporting the convention No. VIII, forbidding the laying of automatic submarine contact mines in the open sea, he declared, as follows:—

"A belligerent who lays mines assumes a very heavy responsibility towards neutrals and peaceful shipping. On that point we are all agreed. No one

will resort to such means unless for military reasons of an absolutely urgent character. But military acts are not governed solely by principles of international law. There are other factors: conscience, good sense; and the sentiment of duty, imposed by principles of humanity, will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German navy, I emphatically affirm, will always fulfil, in the strictest fashion, the duties which emanate from the unwritten law of humanity and civilization. . . . As to the sentiments of humanity and civilization, I cannot admit that there is any government or country which is superior in these sentiments to that which I have the honor to represent.''

Those were brave words to utter, and if we add torpedoing inoffensive merchantmen to the laying of mines, the gallant Marschall will assuredly turn in his grave.

Destruction of Neutral Prizes

According to Article 48 of the 1909 Declaration of London, ''a neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.'' If the belligerent concerned has no convenient port to take his prize into, or, because of the distance he is operating from his home base, it is risky so to do, Article 49 provides thus:—''As an exception, a neutral vessel which has been captured by a

belligerent warship, and which would be liable to condemnation, may be destroyed, if the observance of Article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time." But Article 50 goes on to say that "before the vessel is destroyed, all persons on board must be placed in safety, and all the ship's papers and other documents, which the parties interested consider relevant for the purpose of deciding on the validity of the capture, must be taken on board the warship."

Unabashed Butchery

Such being the law, it is difficult to see how the German submarine warfare can be defended or justified. If it is attempted to defend the sinking of the vessels on the ground of military necessity, or danger to the submarine's safety or success of its operations, the requirements of the above-quoted Article 50 must be fulfilled. But the German submarine commander does not see fit to look after the safety of either the passengers and crews or the ship's papers and documents. Instead, he torpedoes the inoffensive vessel, often without warning, or, at best, with a warning of ten or fifteen minutes, when a respite of sixty minutes is none too much, if all the boats are first to be lowered into the water and then to get safely away from the swirling action of the ship that is soon to sink into the deep. This method of attack is not war; it is butchery and murder in cold blood.

Besides, most of the vessels sent to the bottom are innocent wayfarers. If suspected of carrying contraband, it is competent for the submarine commander

to go on board and examine into her holds. When the law authorizes the extreme case of destruction of a prize, it authorizes the destruction of the vessel, the incriminated goods, and contraband only. According to the German method, however, ship, goods, *and men*, all must go to the bottom. The ship may be innocent, or it may be good prize. That is not material, but sunk she must be. For Germany's enemies must be starved by hook or by crook, by foul means or fair means. If this is warfare, it is not civilized warfare, but barbarous, piratical depredations. Just as the pirate is no respecter of persons, so Germany is no respecter of persons. Both are enemies of mankind, and both deserve to be hunted down.

Reprisals

It is suggested, that as Germany is blockading or starving out its enemies, a neutral should keep away from the prohibited areas. If the neutral continues his intercourse with the latter, it is one form of assisting Germany's enemies, and if, in so doing, he sustains injuries in the war zone, Germany cannot be held responsible. In other words, if England adopts certain illegal measures against Germany, the latter is entitled to hit back, irrespective of law or neutral interests. This procedure is known in law as the *lex talionis*, or a reprisal.

If such *lex talionis* is confined to the belligerents, its legality is not open to doubt. For example, if one belligerent bombards the other's undefended towns or seaports by means of aircraft or armed vessels, the

latter may certainly retaliate "eye for eye," or "tooth for tooth." It is, however, another thing altogether when neutral interests are affected or endangered by these reprisals. In the latter case, the measures adopted are unlawful, against which every neutral must protest and demand compensation for losses arising out of them. If A and B are engaged in a quarrel, there is no need or reason to drag C in, and least of all to do him harm or injury.

Neutral Interests

In time of war, as well as in time of peace, a neutral is entitled to carry on legitimate commerce with belligerents and neutrals. In return, a belligerent may visit and search all neutral vessels for contraband of war, and, if the vessel is liable for condemnation, take her into port. There can, therefore, be no diminution or modification of such a legal right, any proclamation of paper blockade to the contrary. Of course, if a legal blockade of a certain enemy coast has been formally declared and is being effectively enforced, then all neutrals must likewise respect this legal condition. If vessels are caught in the act of running the blockade, they may be captured and condemned. But apart from such a legal blockade, every neutral has the indisputable right to carry on unfettered, legitimate commerce with any nation he pleases.

Under the circumstances both the British Order in Council of March, 1915, and the German proclamations of February, 1915-1917, are illegal. Elsewhere I have attempted to discuss this aspect of the subject in its proper place. Here suffice it to say that such measures curtail and impair the neutral's legal rights.

They are an unwarranted interference with the neutral's right of trade. In the words of the American protest to Great Britain (April 2, 1915), they constitute "a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area and an almost unqualified denial of the sovereign rights of the nations now at peace."

British and German Reprisals Compared

But of the two, it seems that the British reprisal, illegal as it is, is comparatively less objectionable. It merely affects the neutral's property and leaves his life unmolested. No doubt much time and profit is lost by the goods being taken into an English port where they await examination and trial before a prize court, but that is undeniably a lesser evil than the German method, which sends the vessel and goods, and even human lives, to eternity. Besides, the British practice often takes over the neutral goods at the prevailing market price. This may not be profit from the point of view of the neutral vendor, for if the same goods succeed in reaching German hands, the latter would undoubtedly pay a much higher price. But if the same vessel were sailing for an Allied port and were met by a German submarine, he would lose not only his profit but also his capital as well.

Retrospect of Sino-German Relations

Now that China and Germany have broken off diplomatic relations with each other, we will take a retrospect of such intercourse from its very commencement. This history is chequered, and here and there future historians will find morals enough to adorn their tale of international probity and righteousness.

On September 2, 1861, at Tientsin, Prussia concluded its first treaty of amity, commerce, and navigation with China. Coming about a generation after the first arrivals, excepting Russia, who first came in 1689,—Great Britain, the United States, France, Belgium, and Sweden,—the newcomer likewise enjoyed under the most-favoured-nation clause all benefits conferred by the territorial government. These privileges include (1) the grant of consular jurisdiction or extraterritoriality; (2) the low tariff of 5% *ad valorem;* (3) the right of coasting trade; (4) the right of inland waters navigation; and (5) the grant of concessions and settlements.

Kiaochow Agreement

The friendship thus engendered proceeded smoothly until 1897, when two German missionaries were murdered by Chinese rowdies in Ts'aochowfu, Shantung. In the opinion of the aggrieved government, the cordial relations begun thirty-six years ago were in danger of serious disturbance; so in order to strengthen those bonds, China must repent and make suitable amends. Accordingly, on March 6, 1898, the famous Kiaochow agreement was concluded. In it Germany was, as has already been mentioned when we dealt with the question of neutrality, given the lease of Kiaochow Bay for ninety-nine years, as well as the right to construct, with Sino-German capital, two railroads from Tsingtau to Tsinan.

In addition, the convention provides that "the Chinese government binds itself in all cases where

foreign assistance, in persons, capital, or material, may be needed for any purpose whatever within the province of Shantung, to offer the said work or supplying of materials, in the first instance to German manufacturers and merchants engaged in undertakings of the kind in question. In case German manufacturers and merchants are not inclined to undertake the performance of such works or the furnishing of materials, China shall then be at liberty to act as she pleases."

International Scramble

Thus was ushered in the international scramble for leased territories. The legend of "balance of power" was invoked, and three other powers, each deeming its own prestige endangered by the success of its rivals, concluded similar treaties with China. Consequently Port Arthur and Talienwan, Weihaiwei, and Kwang-chow-wan were leased to Russia, Great Britain, and France respectively—the first for twenty-five years, the second "for so long a period as Port Arthur shall remain in the occupation of Russia," and the third for ninety-nine years.

Next came what Lord Salisbury called the "battle of concessions" for railway and mining privileges. For example, within ten months of the Kiaochow agreement, the British railway concessions totalled 2,800 miles; Russian, 1,530; German, 720; Belgian, 650; French, 420; and American, 300. And all this flowed directly from the German seizure of Kiaochow!

War Lord's Instructions

Here was the first rift in the Sino-German lute. Then came the "Boxer" outrages and the Allied

expedition to rescue the foreign legations. The troops under Count Waldersee, leaving Germany for the relief of Peking, were instructed by the War Lord to grant no quarter to the Chinese; on the other hand, the latter were to be so disciplined that they would never dare look at a German in the face again!

The whirligig of time brings its own revenge, and to-day, after the lapse of scarcely seventeen years, this injunction sounds almost too good to be true. For it will be remembered that when the Berlin government replied, on March 10, to China's protest, it expressed great surprise that, of all the neutral nations, this country was the only one whose protest had been accompanied by a threat to sever diplomatic relations in the event of its remonstrance being ineffective. And now the "Vossische Zeitung," commenting on the diplomatic rupture between China and Germany, lamented that even so weak a state as the Far Eastern Republic dared to look defiantly at the German nation!

Mailed Fist Policy

But to return from our digression. At any rate, the imperial command was obeyed, and so the German share of the Boxer indemnity aggregated one-fifth of the total amount, to wit, Mks. 275,165,423.325 or Hk. Tls. 90,070,515. Moreover, for the unfortunate assassination of the German minister, Baron von Kettler, China was to erect a monument here in the capital, so that the regrets of this country for an act of irresponsible homicide might be permanently preserved and publicly proclaimed.

This was not all, but an imperial prince must proceed to Berlin. In course of time Prince Ch'un, who was the Prince Regent at the time of the 1911

Revolution, presented himself at the Potsdam palace. In the eyes of the aggrieved sovereign, China had not yet done enough to show its penitence, so its envoy must tender its apologies in a kneeling posture. The latter declined, and for a time it looked as if the incident would terminate in open hostilities between the two countries. Happily, however, wiser counsels prevailed; the requirement was waived and the threatened breach averted.

Ides of March

Thenceforth the legend of friendship proved mere professional etiquette, although in recent years Germany was inclined to "make up" with the Peking government. If only Germany had not precipitated this war, or if in the eleventh hour she had accepted the inevitable and, by a bold stroke of rare statesmanship, cancelled her obnoxious measures, things might have yet gone well. Indeed, as Whittier has it in one of his poems:—"Of all sad words of tongue or pen, the saddest are these: 'It might have been.'"

But the pursuit of Nemesis is swift and sure and, like the thief that comes in the night, it comes when no man knows how or when. On March 6, 1898, the Kiaochow convention was extorted; on March 14, 1917, China broke off its diplomatic relations with Germany. Julius Cæsar was warned before his death to beware of the Ides of March. Has Germania not enjoined her own Cæsar to do likewise?

Significance of the Rupture

When the Peking government protested to Germany, its note declared that its attitude was "dictated

by the desire to further the cause of the world's peace and to maintain the sanctity of international law." Here we have the true significance of this rupture: the sanctity of international law. In the solemn words of President Wilson's historic address to Congress (April 2, 1917), asking that body to declare the existence of a state of war between the United States and Germany:—"The German government has thrown to the winds all scruples of humanity or for the under standings which are supposed to underlie intercourse throughout the world. At present the German warfare against commerce is a warfare against mankind. The challenge is to all nations, and in making choice of action, our motive should not be revenge, or the victorious assertion of physical might, but only a vindication of the right of human rights of which we are only a single champion."

Path of Duty

China may be weak in terms of howitzers and dreadnoughts, but this is no reason why she should choose the path of submission and suffer her most sacred national rights to be ignored or violated. The wrongs against which she has protested, the sunken rock on which the ship of Sino-German diplomatic intercourse has come to grief, cut at the very root of human life. For the duration of the war official China and official Germany are strangers, but with the German people this country has no quarrel. As a Chinese vernacular daily here puts it:—

"The whole policy of Germany has been dictated by the Kultur of Nietzsche—'Deutschland über Alles.' If this is not killed once for all, it will destroy the whole

world. China owes it to the world and humanity to fight Prussian militarism. For the Germans, the scientific geniuses and the descendants of Goethe, we have nothing but love and respect, but to the Prussian militarists, the swaggering worshippers of the sword, the least we can do is to answer the call which has been sounded by the United States and other neutrals. When we envisage a question which threatens to undermine humanity, we cannot think of our own interests alone, but must be up and arm ourselves."

Pregnancy of China's Decision

Up to date (April 18, 1917) this country has not advanced beyond the stage of diplomatic severance. But it seems that it will not be long before the third step or entry into the war will be taken, since its sister republic on the other side of the Pacific has already cast in her lot with the champions of liberty and humanity, and since the Chinese minister, Dr. W. W. Yen, is still being detained in Berlin, although the German minister and his staff have already left China safely.

The attitude of this country is pregnant with momentous results, and satisfaction is everywhere expressed that, to quote from Reuter's summary of French opinions, "a country such as China, whose civilization traces its origin back to the remotest ages and who pays worship to letters, philosophy, and sciences, has spontaneously placed herself by the side of the nations which defend the ideals of humanity, justice, and progress." That is to say, in the eyes of the civilized world, the China of March, 1917, is not the same as that of March, 1916. Will she be the same in March, 1918?

Sanctity of International Law

This country is, therefore, committed to exert its utmost to maintain the sanctity of international law. If one is asked to state concisely what China stands for, one cannot do better than borrow the happy phraseology of President Wilson, when in delivering his inauguration address (March 5, 1917), he said:—

"These are the things we shall stand for, whether in war or in peace—that all nations are equally interested in the peace of the world and in the political stability of free peoples, and are equally responsible for their maintenance; that the essential principle of peace is the actual equality of nations in all matters of right or privilege; that peace cannot securely or justly rest upon an armed balance of power; that governments derive all their just powers from the consent of the governed, and that no other powers should be supported by the common thought, purpose, or powers of the family of nations; that the seas should be equally free and safe for the use of all peoples under rules set up by common agreement and consent, and that so far as is practicable, they should be accessible to all upon equal terms; that national armaments should be limited to the necessities of national order and domestic safety; and, finally, that the community of interest and power upon which peace will henceforth depend imposes upon each nation the duty of seeing to it that all influences proceeding from its own citizens, meant to encourage or assist revolution in other states, should be sternly and effectually suppressed and prevented."

There is a further significance in China's masculine action. By accepting Germany's challenge to ride roughshod over all considerations of law and humanity, this nation is vindicating its prestige in the council of nations. She is no longer the negligible quantity that men used to know before the fateful days of August, 1914, and as to her future one can only now hazard a guess. It is scarcely two decades since her actual dismemberment was regarded as inevitable; to-day, to quote further from Reuter's message, "China has placed herself without risk or bloody sacrifices, but only by her adhesion to the great principles of international law, and from the very first, on an equal footing with the nations fighting for civilization." Between the two there is a very far cry indeed; yet this is the truth. The history of this evolution—the tardy recognition of China as a member of the Family of Nations—by those who consider themselves the judges of other states' destinies—is interesting. We will do well to study its various phases.

China's International Status

In 1836 Wheaton, the great American jurist, published his "Elements of International Law"—that modern classic authority of Public Law. In 1864, it was translated into Chinese at the expense of the Peking government by the late Dr. William A. P. Martin. In addition, the learned sinologue also translated a few other works on the same subject as well as a manual of the laws of war compiled by the Institut de Droit International.

Thus was introduced into this country that system of law which, first codified and systematised by Grotius, the "Father of International Law," in 1625, has since been appealed to as the criterion of all conduct and transactions, be it in peace or in war, between nations. But the process of assimilation was painfully slow, although the last barriers in the way of free and equal intercourse between China and Western states were not removed until 1860 when, by the Peking conventions of that year, with first England and then France, permanent foreign diplomatic agents were allowed to reside within the metropolis. Much water has flowed under the bridges since those romantic days, and with that flow have likewise disappeared many of the old forces of conservatism and retrogression.

Theory of Europe's Consent

In its original conception International Law is, it is claimed, a body of rules and laws which, founded on European soil, applies to only European states or states with European civilization. In other words, no state can aspire to become a member of the charmed international circle, unless the European powers should consent to its admission. This is a vicious doctrine, for, as an American jurist, Professor Philip M. Brown, has remarked:—"The idea that states like China and Japan are to be admitted to the privileges of international law only on the express consent of the nations of Europe is not only false, but ironical, when one recalls how cynically disregardful of the basic principles of international law the European powers have been. It would seem ludicrous to assert that states do not

exist and are subject to no rights under international law simply because they have not been recognised and, as it were, given proper social standing. Nothing could be more unjust as well as arrogant than the claim that nations possessing European civilization were the sole arbiters of the rights and obligations of other nations under international law."

The doctrine may be pernicious and immoral; nevertheless, a state desiring admission must fight for its rights; they will not be given for the mere asking.

French Blockade of Formosa

For example, during the French blockade of Formosa, in 1884, China communicated her expectation that England would prevent French ships from coaling in British ports. Some action in this sense was about to be taken by the British authorities when the French government declared that its measures of force directed against China were not war as such, but mere reprisals. The dodge was successful; for in the latter case, no state of war existed, and so French ships could continue to coal at all non-Chinese ports.

Here the Peking government no doubt acted in the proper spirit of international law. In 1894, Hall, the English jurist, however, commented as follows:— "Tacitly, and by inference from a series of acts, states in the position of China may in the long run be brought within the realm of law; but it would be unfair and impossible to assume, inferentially, acceptance of law as a whole from isolated acts or even from frequently repeated acts of a certain kind."

Four years later, and with special reference to the then recent Sino-Japanese war, Professor T. E. Holland, one of the eminent living English jurists, remarked:—"The Chinese have adopted only the rudimentary and inevitable conceptions of international law. They have shown themselves to be well versed in the ceremonial of embassy and the conduct of diplomacy. To a respect for the laws of war they have not yet attained."

1901 Protocol

Then came the international scramble for leased territories, mining and railway concessions, loans, the "Boxer" uprising, and the International Protocol of 1901. According to that Protocol, the legation quarter in Peking was to be made defensible; the Taku forts were to be demolished; and various points in the metropolitan province were to be garrisoned by foreign troops, so as to keep open the communication between the capital and the sea; and, finally, an indemnity of Tls. 450,000,000 or £67,500,000 was to be paid in thirty-nine years at an annual interest of 4%. In other words, a total indemnity of Tls. 982,238,150 or £147,335,722 by 1940. China's cup of bitterness was filled to overflowing, and self-appointed prophets foretold the imminent partition of the Celestial Empire.

Dawn of New Era

In the inscrutable wisdom, however, of the real arbiter of human destinies, it was fit that a virile nation that obeyed the very letter of the Fifth Commandment should not perish, but should survive and recuperate.

Hence in the Anglo-Chinese treaty of Shanghai, September 5, 1902, there breathed the welcome signs of a cordial willingness on the part of Great Britain to assist China in its path of progress. Thus the 5% treaty tariff might be increased to 12½% if the inland *li-kin* imposition could be discarded, and the rights of extraterritoriality would be relinquished if the Chinese efforts at judicial reforms should have proved satisfactory.

These promises were reiterated in the Sino-American as well as the Sino-Japanese agreements of the following year, and so dawned steadily the era of goodwill and fellowship. Thenceforth China was regularly invited to participate in the various international gatherings and conferences as an equal among equals.

International Congresses

For example, to the following universal conventions she is a signatory:—Hague Conventions, 1899-1907; Geneva Convention, 1906; Convention relating to Hospital Ships, 1904; Convention for the Creation of an International Agricultural Institute, 1905; Hague Opium Convention, 1912. To the following she is an accessory:—Convention for the Publication of Customs Tariffs, 1890; Geneva Convention, 1864; Universal Postal Convention, 1874-1906; Universal Parcel Post Convention.

Moreover, she has also taken part in such minor gatherings as legislated for prison reform, white slave traffic, bills of exchange, protection of birds, sanitation and hygiene, etc. In other words, "considering her

rapid development of late, her increasing relationships with the West, her efforts to regularize her government, and to fall in line with the conceptions of international intercourse entertained by the civilized communities of the world, it may be said that notwithstanding certain restrictions imposed upon her, she is now a member of the international circle" (Dr. Phillipson, Wheaton's International Law, 1916, 20).

Summum Bonum

As in municipal, so in international ethics, the *summum bonum* of society is a state of equilibrium—a state in which the forces at work are not in conflict, however they may be in action or interaction. If a society is to progress, the members of the community must live in peace and security one with another. Similarly, if international society is to climb the higher rungs of the ladder of civilization,—and be it acknowledged in all conscience that the rungs of this Jacob's ladder are endless,—nations must learn to live in peace and harmony. How this should best be done has been the eternal question, but much as we seem to see through a glass, darkly, the answer cannot be in terms of weapons of destruction. Hence this nation also subscribes to the beliefs "that the essential principle of peace is the equality of nations in all matters of right or privilege," and "that peace cannot securely or justly rest upon an armed balance of power."

For humanity to progress, men must demolish the agencies which now serve to sow the seeds of mutual suspicion and distrust. As in individuals, so in

nations, the lesson of all times is the Golden Rule, or, better still, "Love thy neighbours." If this doctrine is practised, there is no need to invoke that other maxim, "Love thy enemies." Judged by this standard of morality, the nations of to-day do not appear to live in a state of security and contentment. Instead, we hear of injustices and grievances that call for redress or reparation. Will the new world that emerges from this welter of fire and blood promise better things?

China's Imperfect Status

China is to-day vindicating her position in the council of nations. But her international status is imperfect. As the treaties stand at present, there are many impairments of her sovereignty, as well as restrictions, which fetter her natural development and even endanger her national existence.[1]

For the great powers to welcome her into their charmed circle in one breath and, in the next, deny her what are her proper attributes and prerogatives as an independent sovereign state, is ungenerous and disingenuous. Her status of membership in the Family of Nations having been acknowledged, it is but just that all her sovereign rights should be completely restored to her. Unless this is done, it seems that this terrible war will have been fought in vain.

We are, however, not despondent, and we remain confident that at the post-bellum peace conference full

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[1] *Infra*, Part IV.

justice will be done to her rightful claims. For out of this ordeal of fire, there will evolve a world in which all nations will be "free to live their independent lives, working out their form of government for themselves, and their own national development, whether they be great nations or small states, in full liberty" (Lord Grey, March 22, 1915).

CHAPTER III

TREATIES AND CONVENTIONS

We now come to our third or final chapter on treaties and conventions. Since the outbreak of this world war, the only new state which has entered into conventional relations with China is the Republic of Chile. The treaty of friendship and amity between the two democracies was signed in London, on February 18, 1915, and this entry of Chile brings up the number of treaty powers to eighteen. The other seventeen are the following, and the dates of their first treaties are appended: Russia (1689), England (1842), the United States (July 3, 1844), France (October 24, 1844), Belgium (1845), Sweden (1847), Germany (1861), Portugal (1862), Denmark (July 13, 1863), Holland (October 6, 1863), Spain (1864), Italy (1866), Austria-Hungary (1869), Japan (1871), Peru (1874), Brazil (1881), and Mexico (1899).

Japanese Treaties

With the sole exception of the two Japanese treaties of May 25, 1915,[1] which followed the remarkable Twenty-one Demands of January 18 and the still more astounding ultimatum of May 7 of the same year, China's efforts at treaty negotiations have been singularly successful.

[1] For the text of these treaties, as well as of the Sino-Russo-Mongolian, Sino-American, and Sino-Dutch conventions, see the author's "Legal Obligations Arising Out of Treaty Relations between China and Other States," Appendices B, E, D and C respectively.

These Japanese treaties, as well as the heated atmosphere surrounding them, are still fresh in our memory, so we will here just give them a passing reference and proceed to discuss the other treaties and conventions. But this much is pertinent to our inquiry about China's diplomatic relations concerning this war. An exchange of notes between the two governments, after the signature of these treaties, provides that China "agrees to give full assent to all matters upon which the Japanese government may hereafter agree with the German government relating to the disposition of all rights, interests, and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the province of Shantung."

Kiaochow Problem

Now this stipulation is unwarranted from the circumstances of the case. First of all, Japan here innocently forgets that its capture of Tsingtau was not one man or one government's work. It was a joint enterprise between the British and Japanese forces. The article is, therefore, a slight on Japan's ally which is remarkable for its very candour. Great Britain may or may not have been consulted, but it is unthinkable that England has not entered a *caveat* in this matter.

Moreover, the notes go on to say that in return for China's consent, Japan engages that it "will restore the said leased territory to China under the following conditions:—(1) The whole of Kiaochow Bay to be opened as a commercial port. (2) A concession under the exclusive jurisdiction of Japan to be established at a place designated by the Japanese government. (3)

If the foreign powers desire it, an international settlement may be established."

Accordingly, it seems fair to believe that these treaties will be critically reviewed in the peace conference at the end of the war.

Mental Coercion

But there is another vital principle involved in this extortion. According to the terms of the provision, China is made to concur with the Japanese attitude of mind that Germany is as good as vanquished, and therefore China must agree beforehand with Japan to whatever Japan may agree with Germany when the war is ended. For the welfare of mankind we may fervently hope that the government, which at present challenges the whole world by trampling ruthlessly underfoot all that we hold most sacred and most precious in law and order, in progress and civilization, will be brought back to reason. For the good of his own people, as well as the weal of humanity, we say that the outlaw of the world should be disciplined and made to amend himself, but that is very different from one belligerent coercing a neutral government to subscribe to that mental attitude.

Against Germany the government of this nation, by so subscribing itself to the above proposition, may well commit a breach of moral neutrality, if not of legal neutrality. Of course, no belligerent is entitled to question a neutral's private beliefs or unbeliefs, likes or dislikes, so long as these various states of the mind are not transferred to or attested by overt acts. But when the same is reduced to black and white for every person

who runs may read, such positive proof of dislike cannot be viewed with unconcern by the interested belligerent.

Moreover, the present procedure is an entire departure from all sound precedents. When Japan defeated Russia in 1905, the latter agreed at Portsmouth (U.S.A.) to transfer to the former all its rights as a lessee in respect of Port Arthur and Talienwan. Then when the assignee subsequently came to the original lessor to secure his consent to that transfer, the same was formally confirmed in the Sino-Japanese convention of December 22, 1905. That appeared to be a sensible way of doing things.

Retrocession Postponed

I shall deal immediately with the question of legality or illegality of this transfer. But just here let me make a slight digression. Under the original Port Arthur agreement, Russia's tenancy of the leased territory for twenty-five years would expire in 1923. This lease would, therefore, lapse in another six years and three weeks from to-day—the lease was dated March 27, 1898. In the eyes of Japan, the new lessee, this period is too short; so in Article I of the second treaty of May 25, 1915, the original lease is extended to ninety-nine years. This territory will, therefore, not revert to the lessor until 1997.

The same treaty also provides for a similar extension of two other original leases. Thus the lease of that part of the Russian Siberian railway which leads down to Port Arthur and which, transferred by Russia to Japan in

1905, is now known as the South Manchurian railway, will expire in 2002, instead of 1978. Similarly, that of the Antung-Mukden railway will, instead of expiring in another six years, according to the 1908 agreement, terminate in 2007.

Now to return from our excursion. When China leased a piece of territory to a foreign government, its consent was not given voluntarily. Rather her will was overborne by the show of superior force and the lease was wrung from her unwillingly. The conditions of the lease, as we have already seen in the case of Kiaochow, give to the lessee very great powers of occupation short of actual ownership and sovereignty. As these rights diminish *pro tanto* China's exercise of sovereignty, it cannot be imagined that she will consent to a prolongation of that lease. The fact that this diminution is only temporary and only good for a specified number of years does not afford her much consolation. But here, *nolens volens*, a territory which may be restored to the lessor, in the case of Port Arthur, in 1923, is postponed to 1997, and a strategic railway which may be returned also in 1923, is postponed to 2007. The tragedy of this drama is for personal reasons heightened in our own case, because, I suppose, few of us will live to see such retrocessions in A.D. 1997 and 2007!

Nontransferable Lease

Moreover, as in the treaty grant of consular jurisdiction, the lease is nontransferable. A political lease involving vital considerations of territory and

sovereignty is not to be compared with an ordinary lease involving mere lands and buildings. The lease is therefore personal to the lessee government. If the territory in question, even with monetary compensation, is a subject unfit for transfer, it is much less transferable when the lessee governments, as in the leases we are here considering, pay no form or manner of compensation. For political considerations, the inequality of which need not here detain us, China leased Port Arthur to Russia, and for the same reasons she leased Kiaochow to Germany, and so on. But in doing so, the lessor never intended that the lease could be assigned or transferred to another third power. This is conclusive even under the treaties themselves. For example, in the Kiaochow agreement, "Germany engages at no time to sublet the territory leased from China to another power."

Accordingly, when Russia, the vanquished, transferred to Japan, the victor, its rights as lessee over Port Arthur, etc., China should have protested. If the lease is itself untransferable, it is less so when the consent of the lessor has not been asked. And if the transfer has already been made, the lessor need not have acquiesced in the same. Unfortunately, China's voice in terms of physical might is weak, and what is a trespass at law has come to be regarded as a right in law. In the case of Tsingtau the same principles apply; therefore, when China is made to agree to the provision already quoted, she is in effect made to say that the lease in question is not personal to Germany but is transferable to any strong power who so desires it. This may be diplomacy, but not law.

Since such a lease is personal and inalienable, any transfer of the same to a third power is sure to be impeached by the body of world's remakers at the post-bellum conference. If so, China will have to invalidate such a transfer. This prospect cannot be encouraging to Japan. Therefore, it is to her interest to forestall all attempts to upset it.

In international law, there is the doctrine of *uti possidetis*, which signifies that at the peace conference Germany, for example, may keep all the enemy territory which she is occupying to-day, unless the treaty of peace by express words shall exclude that tacit understanding. Now Japan thinks she is the sole occupant of Kiaochow. This occupation is sure to be reconsidered at the peace conference in such a way that the *uti possidetis* principle will not be made to apply. If, therefore, she can get China to agree beforehand that she will confirm what Germany will later transfer to Japan, then the trick is done. China is weak, so she will surely agree. Then at the conference China, at least, will be estopped from raising that question herself. But, fortunately, Japan's veil is too thin to deceive anybody, and we may be confident, therefore, that the world's remakers will not fail to maintain the sanctity of international law.

So much for the Japanese treaties. We will proceed to discuss first the tripartite agreement between China, Russia, and Outer Mongolia, and then the important conventions with the United States and Holland for international arbitration. After that, we shall have done.

Sino-Russo-Mongolian Convention

During the Chinese Revolution of 1911-1912, that portion of Mongolia lying beyond the Gobi Desert and known as Outer Mongolia, to distinguish it from Inner Mongolia which lies nearer to China Proper, revolted and declared its independence. Russia recognised its independence in November, 1912, and began to negotiate with it as a sovereign state. China protested against this ungallant action, and a Sino-Russian agreement was therefore concluded in November, 1913. This was not satisfactory, and so the new Sino-Russo-Mongolian convention of Kiachta, June 7, 1915, was concluded.

Though there is still room for improvement in this document, China seems to have fairly succeeded in winning its main objective, viz., to nullify Outer Mongolia's declaration of independence, while consenting to accord to it some measure of autonomy. This is done by making the territory an autonomous vassal state. Therefore Article II reads as follows:— "Outer Mongolia recognises China's suzerainty. China and Russia recognise the autonomy of Outer Mongolia forming part of Chinese territory."

Extent of Autonomy

The next article provides that "autonomous Mongolia has no right to conclude international treaties with foreign powers respecting political and territorial questions." Such questions are to form the subject of consultation between Russia and China in accordance with Article II of the Sino-Russian agreement of No-

vember, 1913. Both China and Russia "recognise the exclusive right of the autonomous government of Outer Mongolia to attend to all the affairs of its internal administration and to conclude with foreign powers international treaties and agreements respecting questions of a commercial and industrial nature concerning autonomous Mongolia"—a position not unlike that occupied by Bulgaria, as regards Turkey, before the former declared its independence in 1908. And both powers "engage not to interfere in the system of autonomous internal administration existing in Outer Mongolia."

Buffer State

As far as this country is concerned, the main drawback of such a convention is the admission that Russia has a concurrent right of control or supervision over the political relations of China's vassal. But Russia is apparently determined that the advance of China along her borders should not be consolidated, and the best way to accomplish this object is to create a buffer state between her and China. We see a similar anxiety and a similar result in the British attempt to make Tibet a buffer state between India and China.

Russia's object has been gained, under this convention; therefore, she is willing that the full claims of the lawful suzerain should be respected. Hence, it is provided that the military escort of the Chinese representative at Urga is not to exceed two hundred men, whereas the consular guard of the Russian representative is not to exceed one hundred and fifty. Moreover, "on all ceremonial and official occasions the first place of honour is due to the Chinese dignitary."

Arbitration

We now come to the all-important arbitration treaties. I say arbitration, because it is a handy word, and its virtues are readily understood, although only one of them can be properly so called.

Just about the time that the German army attacking Paris was falling back on the river Marne, thus beginning the historic battle of that name, China concluded with the United States, at Washington, on September 15, 1914, a treaty for the advancement of peace. This is one of the twenty odd treaties which Secretary Bryan negotiated with as many other countries about the same time.

In effect the document is a great advance upon the Sino-American arbitration convention which was signed on October 8, 1908—that is, three months after the United States had decided to return to China one-half of its share of the Boxer indemnity.

Sino-American, 1908

In the first agreement, it says that the two states shall refer to the Permanent Court of Arbitration at The Hague, all "differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which may not have been possible to settle by diplomacy . . . provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two contracting states, and do not concern the interests of third parties."

The reservations about vital interests, independence, etc., are taken from the 1899 Hague convention, and so are similarly embodied in the arbitration

convention of August 3, 1909, between China and Brazil.

Sino-American, 1914

In the 1914 treaty, however, these exceptions are omitted, and the two states agree to refer to an international tribunal "any disputes of whatever nature they may be," which they do not see fit to submit to The Hague for arbitration. This new tribunal is an international commission of inquiry of five persons, whose duty it is to investigate upon the facts in dispute and then report their finding. But the finding of the commission is not binding on the two states, which reserve to themselves the right of taking independent action after the handing in of such a report. That is to say, if the two states are not satisfied with this finding, they may either appoint a new commission or even have recourse to the Permanent Court of Arbitration.

Commission of Inquiry

The method of appointing the commission follows that outlined in the 1907 Hague Conventions, No. 1, on the pacific settlement of international disputes. For example, each government will appoint two members, only one of whom may be of its own nationality. The fifth member who is to be the president of the commission, will be designated by common consent, and he is not to belong to any of the nationalities already represented.

Suppose the two governments fail to agree upon the choice of the fifth member, then the four

commissioners will agree to designate one. If these four cannot agree among themselves, then they will choose a third power and entrust it with the selection. If this power fails too, then China and the United States will each select a different power, and the latter powers will make the choice. Suppose these should also not succeed even within two months, then the final alternative is for the latter powers each to present two candidates taken from the list of members of the Permanent Court of Arbitration, exclusive of members already selected by China and the United States and not being nationals of either of them. Let the last two powers cast lots, and whoever of the four is so determined, shall then be selected.

Powers of Commission

This reference to an international commission of inquiry is compulsory. Hence, each party may ask that the dispute be entrusted to the commission for a report thereon. Or the commission itself may take the initiative and offer its good offices to each party. If one party accepts this offer, that acceptance is sufficient to give the commission the jurisdiction of the case.

The commission will complete its work within one year, unless the time is extended by mutual consent. The majority vote of the commission will be adopted. But pending the completion of the report, the two states "agree not to resort, with respect to each other, to any act of force."

The treaty is to last for five years from the date of exchange of ratifications, that is, October 22, 1915, and

unless "denounced" six months before the expiration of that period, it will be valid for at least a year after one party has notified the other of its intention to terminate it.

Hague Convention

Here we have a sane method of settling international disputes. It is, indeed, not perfect, but it is a decided advance over that laid down at The Hague, 1907. Article 9, of conventions No. 1, provides as follows:—"In disputes of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the contracting powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation."

"Expedient and Desirable"

This provision is satisfactory, so far as it goes. But it lags a long way behind the absolute standard which is held forth in the next document we shall discuss. It is not required of every power who signs the convention that it should refer its disputes to an international commission of inquiry, but such a step is only "expedient and desirable," and even then only "as far as circumstances allow."

Moreover, it is not every dispute which can be so referred, but only "disputes involving neither honour

nor vital interests," and then only those which arise from a "difference of opinion on points of fact," not of law. In other words, every time a step forward is taken in the direction of pacific settlement of international disputes, the next foot drags it back. Progress at this rate surely cannot be rapid. This phenomenon is characteristic of almost all the other conventions dealing with the laws and customs of warfare, and represents the result of a compromise between different antagonistic ideas.

Ethics of War

If we concede that human nature can never be purged of its primary animal instincts, if we agree that man will always delight in warfare because, as is alleged, such manly virtues as bravery and endurance, etc., can only be developed by the stern schoolmaster, Mars, then perhaps we ought to be thankful for small mercies. For here is held out some partial escape from mutual slaughter in order to redress an actual or imaginary wrong. But, if we read the signs of the times aright, human nature is not impossible of purification. Nor is Mars the only schoolmaster who can produce such virtues as courage and perseverance; for all around us, in time of peace no less than in time of war, we see countless examples of heroism and self-sacrifice.

If men still indulge in mutual killing, because it is a cheap way of getting rich at the expense of their opponents, this terrible carnage in Europe, with its phenomenal waste of life and treasure, will, we hope, have rudely shattered that delusion. For example,

England is to-day spending on the war in twenty-four hours six millions sterling, or as much as China's revenue from the maritime customs' receipts for a whole twelve months. And this rate has been kept up for the last two years!

The day may be distant when guns and swords will be beaten into ploughshares and pruning forks, but men have shown themselves more reasonable than what the militarists make them out to be. Universal compulsory arbitration *is* possible of attainment, and not a few states have already bound themselves to banish all ideas of recourse to the argument of force from their mutual relations. The progress along this road may be slow, but the rate of progress of the steady tortoise is certainly much to be preferred to that of the hare who runs one minute and then sleeps one hour.

A Just War

For the welfare of humanity it seems that in only one case can war be justified—the exception which proves the rule. I refer to the righteous war which is being fought to-day in Europe. When a state conducts itself in such a way as to outrage all rules of law, all sentiments of humanity, and all considerations of progress and civilization, that state must be made to amend its ways. If soft words cannot coax it, then apply the last argument of force. Let poison fight poison, and let like repel like.

The duty to preserve mankind from permanent destruction transcends that to preserve its peace. If the challenge is to all nations, then the whole world

must act as one man and bring the outlaw to justice and retribution. This is why the United States has joined the struggle against Germany to champion the cause of liberty and humanity. And this is why China and Brazil, among other nations, have also signified their displeasure by severing diplomatic relations with it. This is only temporary, because it seems that before long these two countries will also enter the lists as belligerents.

Guarantee of Peace

Bring the outlaw to book, and then at the peace conference let the states of the world lay down that no future recurrence of the deluge of the last three years shall be tolerated. Let the conference declare that if, in future, any power or group of powers will violate the law, every other state shall rise as one man to attack that state.

If this is done, it is inconceivable that any power will be tempted to court instant disaster and punishment. After all, it is human nature all over. A man obeys the law, because he knows he cannot afford to break it. In the same way, a state will obey the law, because it realizes it can only disturb the peace at its peril. By that time the memory of the past will have burned indelible impressions in the brains of men, and we may, therefore, confidently look forward to a better and more peaceful world in the days to come.

Palace of Peace

We now come to our last lap. When men speak of peace and arbitration, their minds instinctively turn

to The Hague. In that quiet city were held the two notable peace conferences of 1899 and 1907 which, imperfect as they are, have accomplished so signal a success in codifying and systematising the accepted rules and customs of warfare, as well as establishing new laws and regulations for the restraint of the contending forces. And in that serene city is also constructed the Palace of Peace out of the munificence of Mr. Andrew Carnegie—an edifice which lays claim to the unique distinction of being in structure the most cosmopolitan, since all states in the world have contributed in kind to its mural as well as architectural decorations.

Accordingly, it is but meet that the state whose capital is the scene of so many historic gatherings, and who may yet ere long gather within it the last threads of the present tangled skein of world-wide conflagration, should be one of the contracting parties to a document at the touch of which all weapons of warfare will be transformed into ploughshares and pruning forks.

"Chinese Puzzle"

When the second Hague conference discussed No. III of its conventions, which provides for a declaration of war before the commencement of actual hostilities, the Chinese delegate asked a question which none could answer. He said in effect: "If A declares war on B, and B refuses to accept it, what happens then?" The other delegates laughed, and a thoughtless world has since echoed the laugh and called it a Chinese puzzle.

But this country stands for reason, not might, and Chinese philosophy teaches that reason is never so feeble that it must needs be reinforced by might. When the Chinese delegate sought to impress this truth upon the conference, his hearers took it as a joke and called it "not playing the game."

Fable of the Wind and the Sun

The experience of a decade has transformed men's minds, and both the United States and Holland now subscribe to China's moral creed. Namely, if B declares that he will not fight, because rational men need never stoop to the level of irrational beasts, then A will also abandon the fight and co-operate to compose the differences between them amicably. The ideal of peace is here attained, not by the nerve-racking roar of the modern artillery, nor even by the threat of force, but by the gentle voice of moral suasion.

This is the fable of the wind and the sun re-illustrated. The wind blows a biting blast and the traveler draws his cloak tightly around him; but the sun puts forth its rays, and the unconscious judge of the contest between the elements soon takes off his cloak and revels in its benignity. The efforts of the former spell disaster; those of the latter, success. The cause of peace, therefore, finds in this country a never failing friend.

Sino-Dutch Arbitration

The arbitration convention between China and Holland was signed at The Hague, on June 1, 1915. Article I provides that the two governments "agree to

refer to the Permanent Court of Arbitration all differences which may arise between them and which may not have been settled by diplomatic means, and similarly in the case of disputes which have their origin in events anterior to the conclusion of the present convention." Article VI goes on to provide that, except in a case of denial of justice, questions shall not be so referred if, according to the laws of the two states, they are to be adjudicated upon by the national courts, until these courts have first definitively pronounced upon them.

This treaty is to be in force for ten years from the date of exchange of ratifications, namely, April 20, 1916, and is to continue for periods of ten years unless "denounced" six months before the end of each period.

Arbitration Procedure

The machinery outlined in the 1907 Hague conventions, No. 1, is closely followed, as is also the method of appointing the arbitrators. For example, the two parties will first draw up a *compromis*, which will set out the facts of the dispute, the powers of the tribunal, the number of arbitrators, the time as well as the mode of their appointment, the language to be employed before the court, the amount to be deposited in advance by each party to the dispute as its share of the court's expenses, the formalities to be observed in the presentation of the evidence, etc.

If the two states cannot agree upon the drawing up of this *compromis*, then any one of them may ask the court to draw up the same. In such a case, the

compromis will be worked out by a commission of five members, to be appointed according to the method which we have already explained, when we dealt with the appointment of the five commissioners of inquiry in the case of the United States. The fifth member will act as the president of the commission, and the commission will then sit as the arbitral tribunal.

If, however, the above method of appointment is unsatisfactory to both parties, then either one or both may request the president of the United States to designate the tribunal. If this request emanates from both parties, then he will nominate one sole arbitrator; if it comes from only one party, then the tribunal shall be composed of five members.

Revision of Award

The engagement to resort to arbitration implies that the decision of the tribunal will be accepted by both sides. But suppose one party demands that the finding of the tribunal should be revised in the light of fresh evidence, as is not infrequently done in an ordinary court of law; then Article 83 of the 1907 Hague Conventions, No. I, applies. The article is as follows:—

"In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is calculated to exercise a decisive influence upon the award, and which at the time the discussion was closed, was unknown to the tribunal and to the party demanding revision. Proceedings

for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognising in it the character described in the preceding paragraph (viz., that the new evidence will materially alter the verdict), and declaring the demand admissible on this ground."

The tribunal or the arbitrator in this case, instead of the *compromis* provided by the Hague convention, will fix the time within which such a demand for revision must be made.

Proxime Accessit

Here we have an approximately ideal method for the pacific settlement of international disputes. It promises to run for an indefinite length of time, since, unless notice is given six months beforehand to terminate the treaty, the same will be valid for another ten years, *ad infinitum*. And in both scope and compass, it towers far above the encouragement thus timidly held forth in the 1907 Hague convention:—

"In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognised by the contracting powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle. Consequently, it would be desirable that, in disputes regarding the above-mentioned questions, the contracting powers should, if the case arise, have recourse to arbitration, in so far as circumstances permit."

Here we meet our old friend again: "so far as circumstances permit." Arbitration is not compulsory,

but is "recognised as the most effective and, at the same time, the most equitable means," and therefore is "desirable." It is not every dispute which can be so arbitrated upon, but only "questions of a legal nature, and especially in the interpretation or application of international conventions."

"Questions of a Legal Nature"

As examples of disputes involving "questions of a legal nature," etc., we may instance two hypothetical illustrations from China's relations with the powers. The first is the question of extraterritoriality which is here quite pertinent to our inquiry. Under the above-quoted convention, if China and Holland fail to come to an agreement as regards the latter's claim to exercise extraterritorial jurisdiction over the Germans at present in this country, such a dispute may be so arbitrated upon. And this was so decided by the 1907 peace conference, although a few powers tried hard then to oppose the inclusion within its ambit of such a fruitful source of polemic controversies.

Treaty Interpretation

Another instance is the question of text in the interpretation of treaties. In the numerous treaties between China and the eighteen powers there are three different rules for this purpose. According to the first, nine states—Chile, Denmark, Great Britain, Japan, Mexico, Peru, Portugal, Sweden, and the United States—declare that the English shall be the authoritative text. Under the second, five states—Brazil, France, Germany, Holland, and Russia—

declare that the French is the text of authority. And in the third, four states—Austria-Hungary, Belgium, Italy, and Spain—declare that the language of each contracting party is the text of authority.

Such a state of affairs cannot be looked upon with complacency, and it is a cause for congratulation that not more serious disputes have occurred in the past. This question of text and that of consular jurisdiction are proper questions for reference to an arbitral tribunal, even under the 1907 Hague convention. Of course under the Sino-Dutch convention of 1915, these and any other possible disputes will be settled amicably.

A Comparison

At first sight the American treaty is not so effective as the Dutch convention. For, it will be remembered, the report of the former's commission of inquiry is not final, and the contracting parties reserve to themselves the right to take independent action after the handing in of such a report. In practice, however, they both work out similar results, because when two states agree to submit their disputes to an impartial commission, it is inconceivable that they should not further manifest their attachment to peace by finally adopting the verdict of the commissioners.

If this possibility is pure conjecture, there is a practical consideration underlying it. Two states may be impassioned when a dispute arises. Get them to submit the same to an impartial body of investigators for examination and their excitement will subside. Then when, after twelve months, the commissioners report their finding, all passions will have been extinguished

and sound common sense will have returned. And if the commission of inquiry has not otherwise abused its trust and confidence, it seems that its report will eventually be adopted, unless of course fresh evidence shall subsequently crop up to disturb the finding.

American Constitutional Difficulty

In the case of China and the United States, it appears reasonable to assert that disputes which engender dangerous passions are not likely to occur. One is here deducing a formula from the past experience of diplomatic relations between these two states since their first treaty of friendship of July 3, 1844.

The reason why the American agreement of 1914 is not an arbitration convention seems to be this: A recourse to arbitration signifies a consent to accept the decision of the tribunal as final. But under the American constitution the federal government is precluded from so accepting the verdict of any foreign court, be it national or international. Therefore, were the United States to bind itself to accept the judgment of the Permanent Court of Arbitration, it would be attempting something which under its constitution is *ultra vires* or unconstitutional, and hence illegal. On the other hand, a reference to an international commission of inquiry, coupled with an express reservation concerning taking independent action after the handing in of the report, will circumvent such constitutional difficulty and yet achieve the main objective—namely, the advancement of peace and justice.

International Prize Court Precedent

This is similar to what occurs in the 1907 Hague convention respecting the establishment of an International Prize Court. According to this convention, when a neutral is dissatisfied with the decision of a belligerent's prize court, he can appeal to the International Prize Court for a redecision. When the United States signed this convention, it made a similar reservation; and this because its constitution permits of no appeal from the judgment of its Supreme Court.

Hence it is suggested that the complaining neutral will in such a case apply to the International Prize Court for compensation on the ground of illegal capture. This is not technically an appeal, but a new action. If this Court pronounces in favour of the complainant, then the indemnity it awards will be paid by the Washington government. In this way the difficulty will be surmounted and substantial justice done.

Such a suggested mode of procedure was embodied in the agreement of September, 1910, and ratified by the American Senate in February, 1911.

Conclusion

A few more words and we shall have done at last. Our survey of diplomatic relations between China and the Powers is necessarily incomplete. But this much seems plain. In the light of the experience of the past three years this country has found, if not actually regained, its consciousness, and even its very soul, in this bewildering interaction of world forces. The position she occupies to-day is not the same as what

she used to occupy, and, thanks principally to Germany, she has been drawn into the limelight of *weltpolitik*.

Her stand against the violations of international law, whether by Japan, England, or Germany, as well as her treaties with the United States and Holland for the advancement of peace—a condition which, after all, is the normal function of humanity—may be compared to an everyday commonplace phenomenon. Just as the few grey streaks of the early dawn will change to red and then gradually light up peak after peak, until the sky becomes one mass of crimson and scarlet and proclaims the advent of the glorious morn, so China's efforts at making good her position in the eyes of the world will be crowned with success. At present the streaks we see may be a faint grey, but it will not be long before they will turn into a rich gold. Then the day of China's complete rehabilitation will dawn.

PART III

PROBLEMS OF EXTRATERRITORIALITY

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PROBLEMS OF EXTRATERRITORIALITY

CHAPTER I

THE AMOY CASE

The Japanese, we are told, have (December, 1916) established a police-station in the Chinese city of Amoy, because many of their nationals and Formosan subjects are residing therein. In attempted justification thereof the explanation was vouchsafed by "a Japanese source" that "as Amoy is a treaty port, and the treaty applies to the whole city and not merely to the island of Kulangsu and the foreign business quarter bordering the Chinese city on the mainland," the establishment of the police-station "is not a breach of Chinese sovereignty," its object being "in order to more effectively control them."

China refuses to accept such a construction by Japan, and the Government is vigorously protesting against the latter's exercise of this novel *imperium in imperio*. The question is, therefore, one of legal interpretation of treaty stipulations. The point at issue is vital and well repays a careful study.

To begin with, let us make clear of the historical background. Amoy was thrown open to British trade and residence by the treaty of Nanking, August 29, 1842, together with Canton, Foochow, Ningpo, and Shanghai. The island of Kulangsu constitutes the

foreign residential quarter, an international settlement for which was created in 1903. On the mainland adjacent to the Chinese city are situated the foreign business houses. "In 1899, a Japanese concession was marked out on the Amoy side, but has not been developed."[1]

Rights of Extraterritoriality

According to the Japanese contention, "the treaty applies to the whole city"—namely, including the Chinese city. That is to say, the Japanese or any other alien may reside and trade in any and every part of the open port. This view is, however, not borne out by either theory or practice.

Under the aegis of extraterritoriality the aliens in China are not amenable to the jurisdiction of the territorial government. They are, however, bound to submit to the regulations and prohibitions enacted by the local authorities, for extraterritoriality in China "is in no wise arbitrary, but limited by laws, and is not preventive, but punitory."[2] Consequently, for any infractions of these regulations and prohibitions, they are tried and punished by their own national officers.

If they should be scattered about the different parts of a treaty port, it would on the one hand add to the arduousness of their consuls' duties to control them effectively and, on the other, increase the burden of the territorial authorities to afford them adequate protection—a protection already much attenuated by the consequences of the rights of extraterritoriality.

[1]H. B. Morse, The Trade and Administration of China, edition 1913, 255-256.

[2]Secretary Bayard to Minister Denby, in United States Foreign Relations, 1885, 160.

Accordingly, for the convenience of all concerned, special areas are designated or demarcated within the ports or places declared open to foreign trade and residence.

These are either (1) an international settlement—公共租界—administered by a municipal council which is elected by the mixed conglomeration of different nationalities; or (2) a concession—專管租界—leased to a grantee government and administered for the exclusive benefit of its own nationals; or (3) a voluntary settlement, opened spontaneously by China itself for the residence and trade of all aliens—*e.g.*, Yochow, Santuao, Changsha, etc. Hence the foreign settlements in Shanghai, Canton, etc., and concessions in Tientsin, Hankow, Chinkiang, Kiukiang, etc.

The Correct Interpretation

If the Japanese interpretation be correct, then the existence of these international settlements and concessions would be superfluous. But the Japanese view is in direct conflict with Article IV of the Japanese treaty of Peking, July 21, 1896, which reads as follows:—

"Japanese subjects may, with their families, employees, and servants frequent, reside, and carry on trade, industries, and manufactures, or pursue any other lawful avocations, in all ports, cities, and towns of China which are now, or may hereafter be, opened to foreign residence and trade . . . and *within the localities at those places which have already been, or may hereafter be, set apart for the use and occupation of foreigners, they are allowed to rent or purchase houses, rent or lease land,*" etc.

As against the Japanese the above express stipulation is therefore decisive, any interpretation or construction to the contrary notwithstanding. The 1896 treaty, it is true, is not the same agreement which opened Amoy to foreign trade and residence, but the fact that the present international settlements and concessions have existed for the last seventy-three years is sufficient ground for saying that the 1896 convention is declaratory or explanatory of the 1842 treaty.

The Hangchow Precedent

In corroboration of the foregoing, the following case may be cited. In 1896, an American firm endeavoured to open an insurance business within the native city of Hangchow which had been opened by the above Japanese treaty. The Chekiang authorities protested and the American consul referred the question to his principals in Washington. The Department of State held that the afore-mentioned underlined clause was restrictive and so effectually barred the alien's right of admission into any areas not so designated or demarcated.

This opinion was subsequently reported by the United States Minister, Colonel Denby, to have similarly been acquiesced in by Great Britain and other powers.[1] Accordingly, this restriction is incorporated in Article III of the American treaty of Shanghai, October 8, 1903, as follows:—

"Citizens of the United States may frequent, reside, and carry on trade, industries, and manufactures, or pursue any lawful avocation, in all the ports or localities of China which are now or may hereafter be opened to foreign residence and trade; and, *within*

[1] United States Foreign Relations, 1897, 72-80.

the suitable localities at those places which have been or may be set apart for the use and occupation of foreigners, they may rent or purchase houses, places of business, and other buildings, and rent or lease in perpetuity land and build thereon."

A Canon of Interpretation

Moreover, the rule of international law regarding international servitudes must always be borne in mind in the construction of treaties which derogate from the inherent rights, privileges, attributes, and prerogatives of the territorial sovereign. As Hall, the distinguished British jurist, says:—"If there be doubt whether certain powers have or have not been conferred by the territorial sovereign, the doubt must be solved in his favour."[1]

The treaty right of aliens in China to be exempt from the jurisdiction of the local courts and be tried and punished only by their own national officers, is admittedly a derogation from the prerogatives of the territorial sovereign, and as such, is a clear case of international servitude. Therefore, any doubts as to the extent of the powers delegated by the territorial sovereign to be administered by the beneficiary states must be "solved in his favour."

Price of Immunity

If China opens certain ports and places to foreign trade and residence, and within those places demarcates or sets apart special areas therefor, it is because the aliens enjoy the treaty rights of extraterritoriality. Of course, if the extraterritorial rights are withdrawn or

[1] Foreign Powers and Jurisdiction of the British Crown, 1894, 135.

relinquished, every nook and corner of the whole country will be open to foreign trade and residence.

Until that consummation has come to pass, however, it appears inevitable that the aliens, clothed with the rights of extraterritoriality, will be restricted to the demarcated areas within the open ports. As has been well said by the Judicial Committee of the British Privy Council, in *The Imperial Japanese Government v. The Peninsular and Oriental Company*, though the point in dispute there dealt with another allied phase of this system of consular jurisdiction:—"The disability may entail hardships and inconveniences, but it is a necessary result of the immunity from process in the local courts. It is the price for which they (British subjects) must pay."[1]

An Obiter Dictum

In 1908, the Wuhu consular body proposed to amend the regulations for the international settlement of that port so as to debar the Chinese from residing therein. The American consul asked his government for instructions in the matter, and the Department of State replied that "the exclusion of Chinese from these international settlements at the treaty ports would be unwarranted, and would go far to justify the Chinese in their contention, which we have never accepted, that Americans and other foreigners are not entitled under the treaties to reside within the so-called native cities, but should be confined within the limits of their concessions."[2]

The above pronouncement apparently lends support to the Japanese contention. But it is a mere

[1] 1895 Appeal Cases, 657.

[2] Secretary Root to Minister Rockhill, in United States Foreign Relations, 1908, 123.

obiter dictum, as the declaration was not made in the decision of an actual case bearing on that precise point submitted to the Department for review. The *obiter dictum* is, no doubt, entitled to our respect, but in a court of law it will not be given much weight or consideration. In any case it is poor policy to rely on it as an all sufficient mainstay.

Need of Treaty Revision

Under the circumstances, the Japanese contention appears to be untenable, and the establishment of the police-station is a breach of China's sovereignty.

Nevertheless, the above is welcomed in that it does good service in directing attention to the imperfections and ambiguities of the treaties, agreements, and conventions at present subsisting between China and the Powers. The exact interpretation of treaty port limits for trading as well as *li-kin* exemption purposes is, for example, still unsettled, and this uncertainty is likewise a fruitful source of protracted controversies.

The need of treaty revision is therefore urgent, and one may reasonably hope that at the *post-bellum* peace conference in Europe, when the questions of a general readjustment will be discussed, and when a new world system will be reconstructed, under which all nations will be "free to live their independent lives, working out their own form of government for themselves, and their own national development, whether they be great nations or small states, in full liberty"—at such a conference one may hope that a thorough revision of the treaties existing between China and other states will be seriously undertaken.

CHAPTER II

THE POLICING QUESTION

In my first article on the Amoy case (THE PEKING GAZETTE, December 27, 1916)[1] I endeavoured to show that the establishment of a police-station in the Chinese city of Amoy by the Japanese was a breach of China's sovereignty, because foreign trade and residence was restricted by both theory and practice to the special demarcated areas within the open ports—a restriction which appears inevitable as long as the alien in this country remains clothed with the rights of extraterritoriality.

There is (January, 1917) still another ground for challenging the Japanese contention. It will be remembered that their alleged object in establishing such a police-station was stated to be "in order to more effectively control" their nationals and Formosan subjects residing within the city. According to the Press, this argument has similarly been advanced by the Japanese Government in regard to the negotiations with China over the Cheng-chia-tun imbroglio. To appreciate the bearings of this policing question, we will do well to make a general survey of its manifestations in the other open ports or marts in China.

Fallacy of the Japanese Contention

The Japanese contention appears at bottom to rest on the assumption that in a treaty port settlement it is invariably the foreign municipality who controls the

[1] *Supra*, Chapter I.

police and administers the same. Unfortunately, this assumption or presumption is unfounded, for the municipalities in general are far from always being invested with such police control and administration.

Even in the case of international settlements situated within treaty ports—*i.e.*, ports or marts thrown open to foreign trade and residence by special treaties, agreements, or conventions—the practice is not uniform. It varies with the importance of the localities concerned. Shanghai is the national emporium and within its foreign settlements are housed over 18,000 aliens (1915 census). Here the foreign municipalities pay, control and administer their police within the confines of the settlements.

Practice in Ningpo, Soochow, etc.

But in Ningpo (opened under the Anglo-Chinese treaty of 1842), Soochow (opened under the Sino-Japanese treaty of 1895), etc., a different system obtains.

The police are administered and controlled by the local authorities, a certain portion of the *li-kin* proceeds being earmarked for their upkeep and maintenance. The chief of police, however, is a foreigner, employed by the territorial government. If the persons arrested by due process of law be Chinese, they will be handed over to be dealt with by the local authorities. If they be aliens and subjects of states possessing treaty relations with China, they will be surrendered to their own consular officers for trial and punishment in conformity with treaty stipulations. If they be aliens but subjects of non-treaty states, then they will be dealt with conjointly between the local *t'aotai* and the foreign commissioner of customs.[1]

[1] Cases on Treaties, bk. 28, pt. 1, on Police Matters (約章成案匯覽乙篇二十八卷上捕務類.

Right of Chinese Control

But in the case of ports opened voluntarily by China herself since 1898—*e.g.*, Yochow (Hunan), Santuao (Fukien), Changsha (Hunan), Nanning (Kuangsi), Tsinan (Shantung), etc.,—the municipal administration as well as the police control are vested in the Chinese authorities.

In illustration the example of Tsinan, which was voluntarily opened on January 10, 1906, may be cited. Here the aliens are restricted in their trade and residence to a settlement definitely delimited and located outside the walls of the city. The city itself and all territory outside the boundaries of the settlement are regarded as subject to the inland regulations; that is, foreigners may not buy land there, nor reside or trade there, and all goods going to and fro between the settlement and non-settlement areas are treated as shipped or transported into the interior.

The regulations provide for the establishment of a Chinese municipal government and a Chinese police administration, but the extraterritorial powers of foreign consuls are recognized. "In important cases, however, the police may enter any house in search of criminals, even without a warrant. All land in the settlement is bought by the Government and is leased to those who wish to occupy it at a fixed annual rental of from $10 to $30 per 'mou,' according to class, and an annual tax of $2 per 'mou' (one-sixth of an acre).

"The lease runs for thirty years only, and at renewal the rental may be increased, if circumstances warrant.

If rent and taxes remain unpaid for a year, the lease is cancelled. At the expiration of sixty years, if the Government so desires, it may take over the property at a valuation to be determined by arbitrators. Within three years from the date of lease, buildings must be erected on the ground, or the lease will be cancelled, and no sums already paid for rent and taxes will be refunded."[1]

The Case of Peking

Perhaps the best instance of Chinese police control is provided by Peking. Under Article VIII of the Anglo-British agreement of Shanghai, November 8, 1858, the capital is specifically excluded from the trading operations of alien merchants. Article X of the Sino-Japanese agreement of Shanghai, October 8, 1903, stipulates, however, that "in case of and after the complete withdrawal of the foreign troops stationed in the province of Chihli and of the Legation guards," China will forthwith herself open a place of international trade and residence in Peking.

"Accordingly, a place outside the Inner City convenient to both parties and free from objection, shall be selected and set apart as a place where merchants of all nationalities may reside and carry on trade. Within the limits of this place merchants of all nationalities shall be at liberty to lease land, build houses and warehouses, and establish places of business; but as to the leasing of houses and lands belonging to Chinese private individuals, there must be

[1] United States Foreign Relations, 1906, pt. I, 293.

willingness on the part of the owners, and the terms thereof must be equitably arranged without any force or compulsion.

"All roads and bridges in this place will be under the jurisdiction and control of China. Foreigners residing in this place are to observe the municipal and police regulations on the same footing as Chinese residents, and they are not to be entitled to establish a municipality and police of their own within its limits except with the consent of the Chinese authorities. . . ." (Annex 6).

Chinese Determination

From the legal point of view as well as that of all good sense, the above detailed stipulations are judicious, since their very precision will minimize or obviate any possible controversies and so ensure the peace and tranquillity of the community. They are also instructive in that they show "a growing determination on the part of the Chinese to construe the treaties as strictly as possible, and to reduce the privileges heretofore enjoyed by foreign residents, so far as can be done without a violation of these treaties. The newly awakened (December, 1906) feeling of national unity, and the efforts being made to repurchase concessions made to foreign syndicates and develop the resources of the Empire with Chinese capital under Chinese control, are parts of the same general movement."[1]

This determination is natural and legitimate, and deserves every encouragement so long as foreign

[1] E. T. Williams, at present Chief of the Far Eastern Division of the Washington Department of State, in United States Foreign Relations, 1906, pt. I, 293.

residence in this country under the aegis of extraterritoriality constitutes a positive international servitude. In the interests of international trade all these artificial barriers should be broken down, and the sooner they are the better it will be for both China and the world.

The Remedy

The remedy consists in the early relinquishment by all treaty states of their rights of extraterritoriality. For, as has been well said by Sir Robert Hart, a true friend of China, China "so to speak, would be on its honour, and the whole force of Chinese thought and teaching would then be enlisted in the foreigner's favour . . . . Such a change of principle in the making of treaties would widen and not restrict the field for both merchant and missionary, would do away with irritating privileges and place native and foreigner on the same footing, would remove the sting of humiliation and put the Government of China on the same plane as other Governments . . . . Restore jurisdiction (to the Chinese), and the feeling of the responsibility to protect as well as the appreciation of (foreign) intercourse will at once move up to a higher plane."[1]

Accordingly, the Japanese establishment of a police-station in Amoy is unwarranted and a violation *de jure et de facto* of China's sovereignty.

Japanese Police in South Manchuria

If, as has been reported, it is true that the Japanese Government demands the extension of this police system in South Manchuria on likewise the

[1] These from the Land of Sinim: Essays on the Chinese Question, 1900, 143-146.

same pretext of better protection and control of its own subjects, then the recent treaty of May 25, 1915, respecting South Manchuria and Eastern Inner Mongolia, should be studied.

Japanese Treaty, 1915

Article II permits Japanese subjects therein to "lease by negotiation" lands necessary for erecting suitable buildings for trade and manufacture or for prosecuting agricultural enterprises. Article III concedes to Japanese subjects the right "to reside and travel in South Manchuria and to engage in business and manufacture of any kind whatsoever." Article IV stipulates that if Chinese and Japanese desire jointly to undertake agricultural enterprises and industries incidental thereto, the Chinese Government will give its permission.

Then Article V reads as follows:—"The Japanese subjects referred to in the preceding three articles, besides being required to register with the local authorities passports which they must procure under the existing regulations, SHALL ALSO SUBMIT TO THE POLICE LAWS AND ORDINANCES AND TAXATION OF CHINA."

Rule of Treaty Interpretation

Now it is a fundamental rule of treaty interpretation that the provisions of a treaty must either stand or fall together, any attempt being considered as unlawful which purports to enforce some of the stipulations but nullify the others. That is to say, "where the words of a stipulation or provision, taken

by themselves, fail to yield a plain and reasonable sense, recourse should be had either to the immediate context, or, if necessary, to the general purport and tenor of the agreement, including a consideration of its title and statement of objects and heading."[1]

Fortunately, in the present case, there is no room for doubt. The words of Article V are clear, plain, and explicit: "The Japanese subjects SHALL ALSO SUBMIT TO THE POLICE LAWS AND ORDINANCES AND TAXATION OF CHINA." Consequently, to permit the establishment of Japanese police-stations in South Manchuria in face of the express provision that Japanese subjects shall submit to Chinese police laws, is to render the stipulation in question meaningless—a procedure which is a direct contravention of the axiom that "it is to be taken for granted that the contracting parties intend the stipulations of a treaty to have a certain effect, and not to be meaningless."[2]

In the absence of any declaration that the treaty of 1915 is null and of no effect, its provisions are still valid, and therefore the demand of the Japanese to establish police-stations in South Manchuria is invalid and indefensible. It is to be hoped that in the reported settlement of the Cheng-chia-tun negotiations the foregoing premises will find ample justification; otherwise the convention under discussion will be bracketed as another "scrap of paper."

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[1] Pitt Cobbett, Cases and Opinions on International Law, I, 333.

[2] Oppenheim, International Law, I, 586.

Addendum : Cheng-chia-tun Affair

Since the above was written, the terms of settlement of the Cheng-chia-tun Affair have been published.[1] As regards the establishment of Japanese police-stations in South Manchuria and Eastern Inner Mongolia, the situation is summed up in the concluding portion of the Chinese official *communique* issued in connexion with the entire negotiations.

Japan's Demand

Briefly, on January 5, 1917, the Japanese Minister handed the Chinese Government three notes-verbales.

"The third note-verbale had regard to the stationing of police officers. Japanese subjects, it said, travelling and residing in South Manchuria and Eastern Inner Mongolia must increase. For their protection and the preservation of order among them and to prevent misunderstandings, it is necessary to increase the establishment of Japanese police officers and police-stations. This is a corollary of the rights of extraterritoriality and does not violate Chinese sovereignty. Should the Chinese Government not express its concurrence with this view, the Japanese Government would, nevertheless, in case of necessity, be forced to carry it into effect."

China's Reply

After due consideration the Chinese Government replied on January 12th :—"3. In regard to the station-

[1] For a complete text, see the author's "Legal Obligations Arising out of Treaty Relations between China and Other States," 268-280.

ing of Japanese police officers the Agreement of May 25th, 1915, provides that all Japanese subjects in South Manchuria and in Eastern Inner Mongolia referred to in the Agreement, shall 'SUBMIT TO THE POLICE LAWS AND ORDINANCES AND TAXATION OF CHINA.' Questions arising from extraterritorial rights were thus provided for. Although the Japanese Minister may give an assurance that the Japanese police will not infringe the rights of the Chinese police and of the Chinese Local Administration, the stationing of Japanese police (in Chinese territory) will impair the spirit and the form of Chinese sovereignty and provoke misunderstanding on the part of the Chinese people to the detriment of friendly relations.

"In regard to those Japanese police-stations already established in Manchuria, the Chinese Government and Local Authorities have repeatedly protested against their presence. From investigations made by their delegates the Chinese Government are convinced that it was the Japanese police officers illegally stationed at Cheng-chia-tun, despite the protests of the Chinese Government (Cheng-chia-tun being Chinese territory far removed from the Railway Zone), whose action was the direct cause of the regrettable conflict. The Chinese Government can never consent to the establishment of Japanese police-stations in South Manchuria. It again protests and asks for the removal of those police-stations already established.

No Treaty Precedent

"As the seven principal functions of the Japanese police officers detailed in the aide-memoire of October

18th last, are those either which should properly belong to the Chinese police, or those which are provided for by the existing treaties or those which are the duties of the constables (marshals) of consular courts, there is no necessity for the establishment of a Japanese police force. Hence the question of police cannot be associated with extraterritoriality and the Chinese Government cannot recognize it as a corollary (of the right of extraterritoriality). Ever since the conclusion of extraterritoriality treaties between China and the foreign Powers for several decades, no such claim has ever been made.

"This matter has no connexion with the Cheng-chia-tun case, and at the conference the Japanese Minister has repeatedly expressed the desire to detach it from the Cheng-chia-tun case. The Chinese Government considers it necessary to request the Japanese Government to abandon the matter. At the same time, it is not to be construed as meaning the Chinese Government has recognized any action to carry the matter into effect."

The Outlook

Here we have the whole situation in a nutshell. China does not recognize the justice of Japan's claim. Nevertheless, "while the Chinese Government is making up its mind and withholding its consent, the Imperial Government will be constrained to carry it into effect in case of necessity."

But the Japanese claim is, as we have already shown, indefensible. Consequently, it is much to be hoped that this contingent "case of necessity" will never arise and that the Mikado's Government will ere long withdraw from its untenable position.

PART IV

CHINA AND THE PEACE CONFERENCE: PROBLEMS OF TREATY REVISION

PART IV

CHINA AND THE PEACE CONFERENCE: PROBLEMS OF TREATY REVISION

In a former paper (THE CHINA PRESS, March 14, 1917)[1] I discussed the international status of China and said that as China's membership in the Family of Nations had already been formally recognised, an honest and complete recognition of that status should be accorded to her at the *post-bellum* peace conference. In order to bring about such a consummation, the world's remakers—the deliberators at that epoch-making conference admit of no other designation—will have to overhaul thoroughly the existing basis of treaty relations between China and other states.

If the peace of the future in this as well as any other parts of the world is not to be ephemeral, but lasting and permanent,—if a monument worthy of the highest intellects is to be erected for the edification of posterity,—it seems that no settlement will suffice which does not in fact respect China's independence and sovereignty. As is common knowledge, all the belligerents in this world-wide conflagration possess important interests in China. Hitherto these interests

[1] See *supra*, Part II, 188-195.

have existed on sufferance—the sufferance of a government that was impotent to assert its own authority. But with the complete revision of China's treaties and conventions at the peace conference, these should in future thrive on the fertile soil of Chinese friendship and good-will—a friendship born of willingness and cordiality, not one suppressed under the exterior of a keen sense of grievance.

Before we proceed to discuss the problems of treaty revision, we may note the legitimacy of China's claim to take part in the *post-bellum* deliberations. In the light of present (March, 1917) events, a non-settlement of the Sino-German crisis will immediately commit China definitely as a belligerent.[1] If so, the claim of this Republic to participate in those deliberations cannot be contested. But the fact that her neutrality was violated by the Anglo-Japanese expulsion of Germany from Tsingtau,[2] as well as the fact that the Chinese population around the fighting zone have suffered much loss and destruction of life and property, will themselves entitle her to a *locus standi* at the peace conference. For this breach of neutrality no less than the reparation of these losses, suitable amends will have to be made.

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[1] On February 9, 1917, China protested to Germany against its submarine warfare; on March 14, the diplomatic relations between the two countries were severed; and on August 14, China declared war against Germany and Austria.

[2] See *supra*, Part II, 147-159.

CHAPTER I

PRIVILEGES OF FOREIGNERS IN CHINA

Under the present treaties the alien in China occupies a unique position. The privileges he enjoys thereunder are invariably withheld from him in other states, and very often these rights operate against the well-being of even the territorial government. Furthermore, the government of the country must sometimes favor him at the expense of its own subjects—a situation which might well sound Gilbertian were it not so tragic. In short, he is a veritable spoilt child.

SECTION I

Extraterritoriality

To begin with, an alien's residence in China is clothed with the rights of extraterritoriality.

He is immune from the jurisdiction of the local government and is amenable only to his own consul. If he commits an offence or crime, he is to be tried and punished only by his consul or other functionary authorized therefor. If he be a plaintiff or complainant, he has his consul to redress his grievance for him. The latter will directly negotiate with the local authorities, unless there is a Mixed Court in the locality, as in Shanghai, when the alien may himself

petition the tribunal and have his case decided conjointly between the Chinese magistrate and a foreign consular assessor. If the controversy concerns a fellow-alien, it will be regulated by the treaties existing between their respective countries, "without interference on the part of China."

Such exemption from local jurisdiction reaches far and wide. Its virtues follow him wherever he goes. If he travels in the interior or outside of ports or marts opened to foreign trade and commits therein an offence against the law, the local authorities may not punish him. "He shall be handed over to the nearest consul for punishment, but he must not be subjected to any ill-usage in excess of necessary restraint."

If he enters the Chinese government service, he remains for certain purposes within the jurisdiction of his own national officers. For any acts done in his official capacity he may not be civilly liable in his consular court; but if he wounds or kills any one in the performance of his official duties, he is criminally liable but may, if he can, plead the act of state.

If any of his Chinese employees commit an offence, his consul shall first be informed before the former can be tried by the local authorities. "A consul or his deputy may attend the hearing, but he shall not interfere if no foreign interest is involved. The servants of non-trading consuls shall not be arrested unless with the sanction of their masters."

Immunity from Search

In addition, his houses or vessels within the treaty ports are immune from search or visitation by the

territorial authorities. This privilege, of course, does not confer an absolute immunity, it may perhaps constitute a safeguard; for it cannot be intended that asylum therein is to be given to persons who violate the ordinary territorial law. But the exemption, so far as it goes, appears to be complete, even in face of measures adopted by the territorial sovereign for his own defence.

For example, during the insurrection of 1913, the Chinese government proposed, *inter alia*, that the houses and vessels of foreigners should be subject to search under warrants vised by a consul, should one be in the vicinity, so as to prevent any collusion between aliens and secessionists. The suggestion was, however, declined by the foreign diplomatic body, on the ground that the representations "jeopardised the rights of foreigners as assured by treaty," and instead it was suggested that "any case in which a foreigner was accused of complicity with the rebels should be dealt with in accordance with treaty stipulations."

Vagaries of Consular Courts

Moreover, for the same offence an alien is treated by his consular court more leniently than a Chinese by his own national tribunal. Thus accidental homicide is excusable in Western law; in Chinese law the accused may not be imputable, but must nevertheless compensate the deceased's family. Again, in the former system, criminal carelessness may not be punishable unless it results in an injury to the person of

another, as any injury involving damage to property is civilly actionable; but in the Shanghai foreign settlements, Chinese are convicted and sentenced to imprisonment by the Chinese Mixed Courts for carelessness resulting in damage to the property of aliens.

Then there is the practice in most consular courts, the British and the United States Supreme Courts excepted, for the prisoners charged with grave offences to be sent home for final trial and punishment. In such cases the sequel is generally unknown to the Chinese directly interested, and the belief becomes inevitable that such criminals have gone unpunished. This practice should be abandoned. It does injustice to both sides: it damages the good name of the foreign country concerned and robs the Chinese of the satisfaction of knowing that due punishment has been inflicted on the guilty.

Foreign Post-Offices

Finally, there has grown up under the aegis of extraterritoriality a practice in some twenty-five of the open ports for many of the larger states to establish their own post-offices therein. The anomaly is without legal justification, and in none of the conventions is there a provision therefor. "They are not established with the consent of China, but in spite of her. . . . Their establishment materially interferes with and embarrasses the development of the Chinese postal service, and is an interference with Chinese sovereignty."[1]

[1] Minister Conger to Secretary Hay, in U.S. Foreign Relations, 1902, 225.

SECTION II

Legation Guards

In the second place, the fiction of diplomatic exterritoriality has been reduced into a concrete fact. The quarter occupied by the foreign legations at Peking "shall be considered as one specially reserved for their use and placed under their exclusive control, in which Chinese shall not have the right to reside and which may be made defensible;" and each state has the right "to maintain a permanent guard in the said quarter for the defence of its legation."

Here is a positive derogation from the supremacy of the territorial government, which finds no parallel in the other capitals of the world; for under the exclusive occupation clause are denied to the territorial sovereign his rights over his own dominion, and that a vital portion thereof. The effect of such occupation is apparent, and was recently illustrated.

Exclusive Occupation

In the course of the civil war of 1913, martial law was proclaimed at Peking. To safeguard itself against the complicity of foreigners with the insurrectionists, the Chinese government sought the co-operation of the diplomatic body. The Wai Chiao Pu, or Foreign Office, requested that (1) "violent characters should not be permitted to make use of the legation quarter as a refuge;" that (2) "letters and telegrams despatched

from the legation quarter, other than those of the legations and the banks, should be subjected to official censorship by the Chinese;" and that (3) "foreign subjects residing outside of the quarter should be held responsible for the observance of orders issued under martial law."

In reply, the latter observed that "clause (1) was actually provided for by the protocol of 1901, no Chinese other than those in the employ of foreigners having the right to reside within the legation quarter; that clause (2) could not be accepted, but that code telegrams from commerical houses should be franked by the official seal of their legations during the period of disturbance; and that no measures could be taken to enforce clause (3) until the nature of the orders in question had been communicated by the Chinese government."[1]

[1] British Blue Books on Affairs in China, 1914, No. 1, 46.

SECTION III

International Garrisons

The "Boxer" outrages of 1900 must not be suffered to occur again; so "the Chinese government has conceded the right to the Powers . . . to occupy certain points, to be determined by an agreement between them for the maintenance of open communication between the capital and the sea."

Now the stationing of such international garrisons, it cannot be gainsaid, strikes directly at the center of authority. It renders the territorial government powerless to defend itself against any hostile invasion, since any erection of forts for the protection of the capital will impede "free communication between Peking and the sea."

The protocol itself mentions no date when the legation guards as well as international garrisons may be withdrawn. Perhaps their maintenance is conditional upon the powers' conception of the ability of China to afford the legations adequate protection.[1]

[1]According to Article 8 of the Japanese treaty of 1913, when such withdrawal shall be effected, a place shall be set apart in the inner city of Peking for international trade and residence. See *supra*, 232.

SECTION IV

Low Tariff

When foreign goods enter Chinese ports they pay a duty of only 5% *ad valorem*,[1] although since 1902, when the import tariff was last revised, certain goods have been assessed on their specific values. This assessment is admittedly meagre, in view of the fact that the maximum duties at present collected are based on the average values ruling in 1897-1899. Considering the increase in recent years in the price of all commodities, the duty as actually levied is therefore somewhat less than 4% *ad valorem;* whereas Chinese goods entering other countries are dutiable to the extent of from 20% to 40%.

Moreover, when duty has once been paid on imported articles, they may be re-exported within three years, without further payment, if they are destined for another open port; or the merchant may apply for a drawback certificate entitling him to a refund of the amount originally paid, if the goods are bound for a foreign port.

If the merchant exports Chinese goods to foreign countries, the export duty is similarly levied at 5% *ad valorem.*

[1] Those goods entering China by the overland routes—e. g., from Russia, Burmah, Annam, etc. — pay only two-thirds of the levy at the maritime custom houses.

SECTION V

Coasting Trade and Inland Navigation

The coasting trade as well as the navigation of inland waters are privileges usually reserved in other countries for the subjects of the territorial government; in China, however, they are both enjoyable by the alien.[1]

The former privilege is granted in these terms:—"Chinese produce may be carried coastwise from one open port to another on paying Tariff duty at the port of shipment and coast-trade duty (the amount of which shall be one-half of the Tariff duty) at the port of discharge. Chinese produce brought in from another port, if re-exported coastwise within twelve months, will be entitled to a drawback certificate for the half-duty paid, and no export duty will be charged on shipment; but the one-half Tariff duty or coast-trade duty will again be charged at the port of discharge."

The latter privilege is granted as follows:—"British merchant ships shall have authority to trade upon the Yangtze River." Since 1858 this concession has been considerably enlarged, until to-day the alien may navigate the greater portion of China's inland waters.

[1] Coasting trade is, however, denied to Mexican subjects, unless their own government is prepared to reciprocate the like privilege.— Art. 11, Mexican, 1899.

Applicable to Warships

It is claimed that such right of inland navigation also applies to foreign warships, since "British ships of war coming for no hostile purposes, or being engaged in the pursuit of pirates, shall be at liberty to visit all ports within the dominions of the Emperor of China and shall receive every facility for the purchase of provisions, procuring water, and, if occasion requires, for the making of repairs."

Right of Hydrographic Investigations

In addition, it is also contended that such a right carries with it the further permission to make hydrographic investigations in any Chinese ports. Thus in 1890, the claim was challenged in the case of a French man-of-war which had been engaged in surveying and sounding one of the non-open or closed ports, but it was unanimously held by the foreign representatives at Peking that the right was one accorded by treaties.

Colonel Denby, the United States minister, reported the matter to his government and remarked that, as China had no scientific officers, she had no good reason to object to the completion of the humanitarian work of sounding and charting her coasts by foreign officers, although "the great maritime countries of Europe might prohibit such survey."

He continued:—"It happens that we are the only nation that has a treaty which by just intendment may be held to include this subject. The 9th article of the treaty of June 18, 1858, reads as follows:—

'Whenever national vessels of the United States of America, in cruising along the coast and among the ports opened for trade for the protection of the commerce of their country, *or for the advancement of science*, shall arrive at or near *any of the ports* of China, the commanders of said ships and the superior local authorities of government shall, if it be necessary, hold intercourse on terms of equality,'" etc.

Question of Consent

Now this appears to be a rather exaggerated view of the provision, since the word "port" according to the context of the treaties, refers merely to open ports or treaty ports, and it is only within these ports that foreign warships may be stationed for the protection of their nationals' commerce. It may be admitted that the work of sounding and charting the Chinese coast is humanitarian; at the same time the consent of the territorial government should at least be obtained.

SECTION VI

Most-Favoured-Nation Clause

Under the most-favoured-nation clause, China is not to discriminate one alien against another, but all foreigners must be treated on the same footing in such matters as tariff imposts, right of trade, commerce, and navigation, etc. If any modifications are to be introduced thereto, such amendments will likewise be applied to all, and whatever extensions thereof are granted to one state will *ipso facto* be enjoyed by all.

In contrast with the practice in other states, this right is already exceptional, but the clause is also invoked against the nationals of the grantor. Accordingly, China may impose a tax on the articles manufactured by the alien in its ports, but "such tax shall neither be other than that payable by the Chinese subjects, nor higher." Again, it may prohibit an alien vessel from navigating a particular inland waterway, provided the regulation is equally applicable to a Chinese vessel.

Case of C. M. S. N. Co.

For example in 1899, an attempt was made to subsidise the China Merchants Steam Navigation Company, a Chinese concern operating in competition with foreign companies, by remitting a portion of the duties on goods imported by native merchants in their vessels, as well as relaxing the customs examination

regulations governing the personal effects of Chinese officials travelling therein. But the scheme never materialized. It was subsequently discovered that these exemptions would constitute an evasion of Article III of the American treaty of 1880, which provides that no other or higher duties will be imposed upon American vessels or cargoes "than are imposed or levied on vessels or cargoes of any other nation or on those of Chinese subjects." The British minister protested and so the proposed exemptions were rescinded.

SECTION VII

Special Protection

In all treaties it is provided that the subjects or citizens of the contracting parties shall each within the dominions or territories of the other enjoy full protection in person and property. In China, however, the alien enjoys a special right of protection, according to which the territorial authorities shall defend him from all insults and injuries. If his dwellings or property be threatened or attacked by mobs, incendiaries, or other violent or lawless persons, the local authorities, on the requisition of his consul, shall immediately dispatch a military force to disperse the rioters, apprehend the guilty individuals, and punish them with the utmost rigor of the law.

No Embargo or Requisitions

This right is further extended to imply that no embargo shall be placed by the territorial authorities on his vessels and property; "nor shall they be seized or forcibly detained for any pretence of the public service: but they shall be suffered to prosecute their commerce in quiet, and without molestation or embarrassment."

Even in time of war between the territorial government and a third state, the right shall exempt the alien from all compulsory military service whatever, whether in the army, navy, or national guard

or militia; from all contributions, whether pecuniary or in kind, imposed as a compensation for personal service; and, finally, from forced loans, charges, requisitions, and war contributions, unless imposed on real property when he shall pay them equally with a Chinese.

Doctrine of Liability in Other Countries

In international theory and practice it is generally admitted that, in the case of injuries to the person or property of aliens residing within his dominions, the liability of the territorial sovereign is predicated only where he could have foreseen as well as prevented the awkward consequences. If the actual violence could not have been either foreseen or avoided by any exercise of vigilance on his part or that of his officers, the territorial sovereign is absolved from blame. *Nemo tenetur ad impossibile.* To hold him to strict accountability in all cases is to compel him to place alien subjects on a more favourable footing than that accorded to his own subjects.

International Practice in China

In China, however, the above equitable doctrines have generally been disregarded, and until recently the territorial government has always been held to an absolute responsibility. The burden imposed upon China is most irksome. Were aliens not entitled to the rights of extraterritoriality wherever they reside or travel in China, the territorial sovereign would have complete jurisdiction over their person and property and so could be held responsible for their fullest

protection. As we have seen, however, even this much is not admitted or conceded by Western governments in their relations with one another; but add the embarrassments of extraterritoriality and the consequent diminution of jurisdiction over foreigners to the shoulders of China, and the injustice of holding her to absolute responsibility becomes at once apparent.

Claims for Compensation

Then there is the question of exorbitant claims for compensation and indemnification. When the Chinese government demanded an indemnity for the losses of Chinese residents in Rock Springs (Wyoming), twenty-eight of whom had been massacred and fifteen wounded by some 150 armed alien miners, Secretary Bayard replied as follows:—

Attitude of the United States

"The government of the United States recognises in the fullest sense the honorable obligation of its treaty stipulations, the duties of international amity, and the potentiality of justice and equity, not trammeled by technical rulings nor limited by statute. But among such obligations are not the reparation of injuries or the satisfaction by indemnity of wrongs inflicted by individuals upon other individuals in violation of the law of the land. Such remedies must be pursued in the proper quarter and through the avenues of justice marked out for the reparation of such wrongs. The doctrine of the non-liability of the United States for the acts of individuals committed in

violation of its laws is clear as to acts of its own citizens, and *a fortiori* in respect of aliens who abuse the privilege accorded them of residence in our midst by breaking the public peace and infringing upon the rights of others.''

But for the murder of two German missionaries in Shantung in 1898, Germany obtained the lease of Kiaochow Bay, and for the death of a French priest in the same year, France obtained an indemnity of Tls. 1,200,000 as well as mining rights in six districts, extending over six degrees of longitude, in the heart of Szechwan!

Boxer Indemnity

What is more, in most cases indirect as well as illegal claims were also demanded and paid under protest, so much so that in 1900 the Commission on Indemnities, appointed by the foreign representatives to examine the claims to be presented to the Chinese government in respect of foreign losses arising out of the ''Boxer'' troubles, decided to abrogate the former practices and laid down that ''damages shall not be claimed, except in cases which are immediate and direct consequences of anti-foreign movement.'' Even then China had to pay an indemnity of Hk. Tls. 450,000,000 (£67,500,000), which was to include the liquidation of the various allied governments' expenses in respect of their joint military expedition. The amortisation was to spread over thirty-nine years and to bear interest at 4% per annum, so that by 1940 the total indemnity paid would have amounted to Hk. Tls. 982,238,150 (£147,335,722)!

CHAPTER II

DISABILITIES OF FOREIGNERS IN CHINA

So much for the foreigner's privileges in China. These are unique and infringe considerably upon the territorial sovereign's supreme authority. As is inevitable, they must have their limitations somewhere, if China is to retain some semblance of independence. These limitations, of course, flow naturally from the extent of such rights and privileges, but they are not always so recognised or at best only half-heartedly admitted by the alien himself.

SECTION I

Demarcated Areas within Treaty Ports

In the first place, the alien merchant may only frequent and reside in those ports or places which have been declared by special treaties open to foreign trade and residence, and within these ports he may only reside and do trade in an area definitely bounded and delimited.

Such demarcated area is an undoubted restriction, but yet a necessary evil under the ægis of extra-territoriality. If all foreigners should be scattered about the different parts of a treaty port, it would on the one hand add to the arduousness of their consuls'

duties to control them effectively, and, on the other, increase the burden of the territorial authorities to afford them adequate protection, a protection already much attenuated by the consequences of the rights of extraterritoriality.

Kinds of International Settlements

Accordingly for the convenience of all concerned, special areas are designated or demarcated within the ports or places declared open to foreign trade and residence. These are either (1) an international settlement, administered by a municipal council which is elected by the mixed conglomeration of different nationalities; or (2) a concession, leased to a grantee government and administered for the exclusive benefit of its own nationals; or (3) a voluntary settlement, opened spontaneously by China itself for the residence and trade of all aliens—*e.g.* Yochow (Hunan), Santuao (Fukien), Changsha (Hunan). etc. Hence the foreign settlements in Shanghai, Canton, etc., and concessions in Tientsin, Hankow, Chinkiang, Kiukiang, etc.

Rule of International Servitudes

It may be contended that if China opens a port or place to foreign trade and residence, it is meaningless to restrict such trade and residence to definitely demarcated areas; the provision should rather include the whole port and the Chinese city, as well as the foreign business and residential quarters. But the rule of international law regarding international

servitudes must always be borne in mind in the construction of treaties which derogate from the inherent rights, privileges, attributes, and prerogatives of the territorial sovereign.

As Hall says, "If there be doubt whether certain powers have or have not been conferred by the territorial sovereign, the doubt must be solved in his favor."[1] The treaty right of aliens in China to be exempt from the jurisdiction of the local courts and to be amenable only to their own national officers, is admittedly a derogation from the prerogatives of the territorial sovereign, and as such is a clear case of international servitudes. Therefore, any doubts regarding the extent of the powers delegated by the territorial sovereign to be administered by the beneficiary states must be "solved in his favor."[2]

Price of Immunity

If China open certain ports and places to foreign trade and residence, and within those places demarcate or set apart special areas therefor, it is because the aliens enjoy the treaty rights of extraterritoriality. Of course, if these rights are withdrawn or relinquished, every nook and corner of the whole country will be open to foreign trade and residence. Until that consummation has come to pass, however, it appears inevitable that the aliens, clothed with the rights of extraterritoriality, will be restricted to the demarcated areas within the open ports.

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[1]Foreign Powers and Jurisdiction of the British Crown, 135.

[2]See *supra*, 224-228.

As has been well said by the Judicial Committee of the British Privy Council, in *The Imperial Japanese Government v. The Peninsular and Oriental Company*, though the point in dispute there dealt with another allied phase of this system of consular jurisdication, "the disability may entail hardships and inconveniences, but it is a necessary result of the immunity from process in the local courts. It is the price for which they (British subjects) must pay."

Treaty Port Limits

Then there is the question of the exact limits of a treaty port. The boundaries of such port are defined by the customs authorities for the enforcement of the port and shipping regulations, but it is still unsettled how far these limits extend for the purposes of foreign trade and commerce. On April 10, 1908, the Waichiaopu addressed the foreign diplomatic body as follows:—

Chinese Attitude

"In none of the treaties has it been clearly expressed how the limits of a 'treaty port' and the 'interior' must be defined. In the Chefoo convention between China and Great Britain (1876), section III, it is said that no *li-kin* ought to be collected on foreign goods within the concessions or settlements of the open ports. Afterwards it appears from the Additional Articles to this agreement that the question required further consideration. All this shows that the above is a question which

has not been properly settled between China and the foreign powers.

"Up to now the foreign ministers in Peking held the opinion that the words 't'ung shang k'ou ngan' (treaty port) comprised the port, the city of the port, and any road or waterway connecting these two. To this defining of limits we have never agreed. This time the consular body in Shanghai holds that the limits of the port are determined by the Maritime Customs in accordance with the requirements of the shipping visiting the port, and that within the limits thus determined the levy of *li-kin* is not permissible. This contention is only a proposal from the consular body and cannot be taken as definite."

Foreign Attitude

In reply the foreign diplomats observed:—"In the absence of an explicit definition acceptable to both sides, the intention of the treaties must be examined, and it will doubtless be conceded that the imposition of import duties on foreign merchandise was intended to admit those goods to particular markets in China, and that it was not intended that these goods should pay other dues until transferred to more distant markets in the interior. Similarly with native products, it was only intended that when they were purchased at a more distant market in the interior for conveyance to a treaty port, and shipment abroad, they should pay a transit due in excess of the import duty.

"That the foreign powers in negotiating the treaties, intended that a fairly liberal area should be

comprised by the term 'treaty port' or 'port open to foreign trade' is evidenced by the use of the terms 'cities and towns' in the English text of the British treaties, and 'ports et villes' of the French treaties; also by the rules regarding the issue of passports for travelling in the interior, where no passport is called for within 100 *li* (33 miles) of the treaty port. The tendency, on the other hand, of the Chinese authorities has been to restrict the meaning of the term within the narrowest limits, with the consequence that the tariff on a basis of five per cent. *ad valorem* becomes in effect transformed to a seven and a-half per cent. tariff.''[1]

[1] United States Foreign Relations, 1908, 143-145. See the author's "Legal Obligations," etc., §29, for Kau Ching-tong's case which proves that the 100 *li* rule applicable to travelling for pleasure, is inapplicable for commercial or judicial purposes.

CHAPTER III

PROBLEMS OF TREATY REVISION

Here then we have in outline the status of the alien in China—his privileges and disabilities. He wants to do trade in China, but yet has no desire to subject himself to the local jurisdiction. He wants his trading opportunities to increase and his commercial privileges to extend, but is impatient at the law's delay and the treaty's strict interpretation.

These conflicting desires inevitably clash and the peace of the community is thereby disturbed. Under such circumstances international trade and commerce cannot flourish but must be fostered by artificial nutrition.

This is short-sighted policy and should be discarded. But as long as the treaties which are responsible for its existence are unaltered, the present state of affairs will always continue. Therefore the treaties existing between China and the powers should be promptly revised and overhauled, so that ample justice will be done to both sides and international trade as well as international intercourse will develop along their normal lines.

The foregoing sketch will indicate what directions such treaty revision should take; nevertheless, we will do well to re-study a few of the more urgent problems.

SECTION I

Abolition of Extraterritoriality

In the first place, if international commerce is to thrive in China, for China desires trade as well as any other nation, and if this trade is not to be hampered by artificial barriers, the remedy lies in the early relinquishment by all treaty states of their extraterritorial rights. If this is done, then every nook and corner of this vast country may be thrown open to foreign trade and residence, and then all the formalities and restrictions respecting passports, demarcated areas, etc., may be dispensed with.

True it is that Great Britain, as well as the United States, Japan, and Sweden, has promised that she "will be prepared to relinquish her extraterritorial rights when she is satisfied that the state of Chinese laws, the arrangement for their administration, and other considerations warrant her in so doing." But one would have wished that the words "and other considerations" were more precise. For the interpretation of those words may vary with the different treaty states according to the nature of their political interests, and Sweden, for example, will surrender its consular jurisdiction "as soon as all other treaty powers have agreed" to do the same.

Probationary Time-Limit

Now the promise to relinquish is explicit; so are the precedent conditions. The consent is admirable; but it might have been perfect if it had been coupled with either a probationary time-limit clause or an honour clause. To stipulate that within a definite period of say, five or even ten years, if China shall satisfactorily reform her judiciary in harmony with the Western systems, all extraterritorial rights therein will be surrendered or withdrawn, will provide a strong incentive to a people who are doing their utmost to put their house in order after the blighting maladministration of the last alien dynasty. And in proof of this we may remember the spirit of the Sino-British campaign against the growth, importation and consumption of opium, which, begun in December, 1907, and scheduled to be spread over ten years, was finally crowned with success in April, 1913.

Putting the Chinese on Their Honour

This is not all, but a still more powerful inspiration is the honour clause that binds the treaty states to rely implicitly on the loyalty of the Chinese people to perform their contract within the stipulated time-limit. Because China, "so to speak, would be on its honour, and the whole force of Chinese thought and teaching would then be enlisted in the foreigner's favor . . . . Such a change of principle in the making of treaties would widen and not restrict the field for both merchant and missionary, would do away with irritating privileges and place native and foreigner on

the same footing, and would remove the sting of humiliation and put the government of China on the same plane as other governments. Restore jurisdiction (to the Chinese) and the feeling of the responsibility to protect as well as the appreciation of (foreign) intercourse will at once move up to a higher plane."[1]

For all the appearance of the conventions one may, perhaps, read such implications into "and other considerations." The goodwill of the negotiating governments stands revealed in their declared intention to surrender these rights, and it is reasonable to infer that thereby they are resolved to afford China every encouragement in the consummation of its reforms. It may be freely admitted that China has judicially a long way to travel before the treaty states will consent to a waiver of their extraterritorial rights. But it is much to be hoped that the adoption of some such suggestions as the above will be possible as a preliminary step to the ultimate abolition of extra-territoriality.

[1]Sir Robert Hart, These from the Land of Sinim, 143-146.

SECTION II

Tariff Revision

When foreign imported goods are conveyed into the interior for sale, or when Chinese produce is conveyed to the coast for shipment abroad, miscellaneous inland dues known collectively as *li-kin*, will have to be paid. Such inland taxation is to the alien merchant a source of continual complaint; accordingly he has the option to protect his goods therefrom by the payment of a lump sum as commutation tax or transit duty. This sum is calculated at one-half Tariff duty, if the goods are dutiable, or $2\frac{1}{2}\%$ *ad valorem* if duty-free. But within the area included in an international concession or settlement, such dues will not be collected.

Abolition of Li-kin

In the "Mackay" treaty of September 5, 1902, the Chinese government undertakes to abolish the *li-kin* so soon as all treaty powers will likewise act upon the engagements of Great Britain. In return for this abolition as well as compensation for the consequent loss of revenue, imported foreign goods will pay a surtax of $7\frac{1}{2}\%$ *ad valorem*, or a total of $12\frac{1}{2}\%$.

So far, however, only the United States and Japan have agreed to be similarly bound as Great Britain; therefore, pending the consent of the other treaty

states, the accomplishment of this reform must yet be deferred.

Question of Compensation

In the interests of domestic as well as international trade, all inland taxation should be discarded, but the revenue accruing from foreign imports must first be able to replace its abolition. For the alien merchant it has been suggested that, given larger rights of trade and residence, etc., they might consent to a tariff increase of from five to fifteen per cent. But unfortunately, the alien's rights of extraterritoriality follow him wherever he goes, and an extension of the areas reserved for foreign trade and residence will still further exempt him from the jurisdiction of the local authorities. Therefore the inducement in the form of augmented surtax must needs be attractive, if China is to close with the bargain, pending the abolition of extraterritoriality.

At any rate, until further agreement it is only fair and equitable that the present duties should be reconverted, not according to the prices ruling in 1897-1899, but according to those obtaining to-day, in order to raise them to an effective 5%.[1]

[1]Since the above was written, the matter of tariff revision has been taken up and at the present moment (February, 1918) a commission of Chinese and foreign delegates is now sitting in Shanghai to effect such a conversion.

SECTION III

Withdrawal of Legation Guards, etc.

It will be remembered that the object of stationing legation guards and international garrisons was to prevent a recrudescence of the "Boxer" outrages in 1900. Such precautions are now no longer necessary, since the Chinese have long awakened to a sense of their international obligations and also demonstrated in this war, when the number of such troops has been considerably reduced, that they are quite capable of looking after the safety and security of the foreign legations. These guards and garrisons should therefore be withdrawn as early as is convenient, so that in accordance with the Japanese treaty of 1903, Peking may also forthwith be thrown open to international trade and residence.

Withdrawal of Foreign Post-Offices

Besides, all alien post offices in the country should likewise he withdrawn, for China has since March 1, 1914, entered the Universal Postal Union. The act of admitting a new member into the Union presupposes a recognition of the efficiency of its system on the part of the other co-signatories or co-accessories. Under the circumstances, there is no valid reason for the further existence of such alien institutions.

Retrocession of Leased Territories

Finally, all territories leased from China should be restored, since the circumstances which had called

them into existence have fundamentally altered. When Germany occupied Kiaochow in 1898, Russia secured the Liaotung peninsula for twenty-five years in order to protect its own interests. The advantage of the latter was deemed fraught with evil, so Great Britain demanded a foothold in Weihaiwei "for so long a period as Port Arthur shall remain in the occupation of Russia." The "balance of power," it was claimed, must be maintained; France consequently obtained a similar privilege in Kwang-chow-wan for ninety-nine years, namely, as long as Kiaochow should continue in the occupation of its usufructuary.

Cessante ratione, cessat lex ipsa

In other words, the lessees were mutually jealous and suspicious of one another and, therefore, each sought at China's expense to safeguard his own security. To-day, however, all this has changed. Germany is no longer in possession of Tsingtau, and England, France, and Russia are now so many allies and comrades in arms bringing the Outlaw of Europe to justice and retribution. As regards Kiaochow, China and Japan have already agreed that it should at the end of the war be retroceded to the former, who would then throw it open as a free port to international trade and residence.

Therefore the corner-stone of the legend of "balance of power" has disappeared, and with it likewise the artificial props for its support. Accordingly, these leases should forthwith be cancelled. *Cessante ratione, cessat lex ipsa.*

SECTION IV

Limitation on Passports

When the system of extraterritoriality has been abolished, the territorial government may with justice be held responsible for any insufficiency of protection afforded to the alien's person or property. Pending such consummation, however, the present lax regulations respecting the issuance of passports for inland travel should be made more stringent.

Apart from the provision that a passport shall not be issued for regions disturbed by persons in arms against the government, there do not appear to be any restrictions governing the issuance of such papers. In a few treaties it is stipulated that these may only be granted to respectable persons, or "*personnes qui leur offriront toutes les garanties desirables,*" but such a limitation is more nominal than real.

Necessity of Restrictions

This laxity affects the territorial authorities adversely, since they are invariably held responsible for any injuries that may be sustained by the alien over whom they can exercise no control and who, in the event of any violation of law, can only be arrested and surrendered to his nearest consul. In the words of Lord Curzon, "a very strict revision of the conditions of travel and residence in the interior is much to be desired. Some limitations ought to be placed upon

the irrepressible vagrancy of European subjects over remote parts of the Chinese dominions. Passports should be absolutely refused at the discretion of the Minister, and exercised with regard to the character both of the locality and the applicant. When granted they might specify the name of the province, district or town to which, and to which only, the bearer is accredited. Already they give a general sketch of the route which he proposes to follow."[1]

Alien Should Report Movements

Under the present system of extraterritoriality or pending its abolition, it seems very necessary that if the alien is to be accorded adequate protection he must communicate his whereabouts or movements to the local authorities; for having been so informed, the latter may fairly be held responsible for any negligence on their part. This salutary measure is, however, denied to the territorial government, since it is said the conventions only provide that "these passports, if demanded, must be produced for examination in the localities passed through."

So when China demanded some such regulations as the above, the foreign representatives admitted that, when an alien passed through a region, the local authorities might ask to examine his papers, but they could not consent to the proposition that he should report himself or his movements wherever he went. Nevertheless, it is significant that in reporting the

[1]Problems of the Far East, 308.

matter to his government, the United States Minister suggested that "on the traveller's arrival at any departmental or district city, he may be required to report his arrival to the local magistrate, as well as the route which he proposes to follow on his departure therefrom." This suggestion was regarded as judicious by the Department of State.

Conditions in South Manchuria

Hence in South Manchuria, some such regulations are in force. Under the treaties of May, 1915, Japanese subjects are free to travel and reside in South Manchuria. Accordingly, it is provided that Japanese subjects residing or travelling therein are "required to register with the local authorities passports which they must procure under the existing regulations."

Now the act of registration is a right step forward, although there is still much room for improvement. The present looseness of control imposes upon the territorial sovereign an unfair hardship, so in the interests of their own nationals as well as justice to the Chinese people, it is hoped that either the new Japanese arrangement will be extended or that some other amelioration over the existing procedure will be agreed upon by the treaty states.

SECTION V

Removal of Ambiguities

If the origins of controversies over treaty provisions be investigated into, the greater half will be traced to the door of the vague and ambiguous terminology of the treaties, agreements, and conventions themselves. Such lack of precision is no matter for surprise, when it is borne in mind that these treaties were not concluded between parties who were equally situated and whose intentions were *ad idem*. The stipulations were rather inserted so that their language might be adaptable to the flexibility of circumstances, whenever arising. This may be diplomacy, but it certainly is not good law or sound statesmanship.

In the dispute over the exact limits of a treaty port for commercial purposes we have already noted one instance. That fortunately, is what may be termed an academic dispute, and not one which may lend itself to a bellicose *denouement*. But the fact that controversies of the latter category do exist assuredly renders a revision of the treaties an absolute necessity, if all elements of future discord and bickering which may at any moment end disastrously, are to be obviated. As an illustration of the latter the question of territorial waters limit may be cited.

Territorial Waters Limit

For the purposes of revenue protection it is universally recognized that a state may adopt whatever measures it deems necessary within its territorial waters; it does not appear, however, that either theory or practice is unanimous concerning the extent of such waters. With the exception of Mexico, such limits are left undefined in any of the treaties concluded between China and other states.

The *Tatsu Maru*

This omission is conspicuous, in view of the gravity of the subject. Its awkwardness was demonstrated in the case of the *Tatsu Maru*, a Japanese vessel which was seized on February 5, 1908, within Chinese waters, but apparently outside the three-mile limit, for attempting to smuggle war munitions to Chinese insurgents through one of the southern ports. China proposed to refer the dispute to international arbitration, but Japan declined; finally the latter's demands were conceded, whereupon "Japan undertakes to cooperate in the task of preventing the smuggling of arms into China."

The point at issue was whether such seizure was legitimate beyond the three-mile limit, in order to prevent a violation of the revenue laws of the littoral state; to this question the settlement, it must be confessed, did not suggest a judicial solution.[1]

[1]For a detailed discussion of this case, see the author's "Legal Obligations," 47-48.

SECTION VI

Chinese Exclusion and Discrimination Laws

Finally, the exclusion and discrimination laws enforced against Chinese entering or residing in a few treaty states or their self-governing colonies should be either abrogated or modified.

For example, from the United States as well as its possessions, not merely Chinese "laborers" are excluded, but only specified exempt classes are admitted. From the Union of South Africa all classes of Chinese are excluded, under (a) the power vested in the Immigration Department to deny admission to "any persons deemed by the Minister on economic grounds, or on account of standard or habits of life, to be unsuited to the requirements of the Union or any particular Province thereof": and (b) the dictation test "in any European language," including Yiddish. From the Commonwealth of Australia and the Dominion of New Zealand they are likewise excluded, if they fail to pass a somewhat similar dictation test. And in the Dominion of Canada, the restriction is relaxed to the extent of admitting Chinese laborers upon their payment of a poll-tax of £100.

Discriminatory Enactments

As regards discriminatory enactments against Chinese residents, the Chinese children in California

are not permitted to study in the same schools as the white children, but must be segregated in special oriental schools. This is a violation of Article VII of the Sino-American treaty of 1868, which provides that "reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the Government of the United States, which are enjoyed in the respective countries by the citizens or subjects of the most favored nation."

Chinese in Canada

In Canada, the state legislature of Saskatchewan enacted, in 1912, that no Chinese laundry or place of business or amusement was to employ a white woman or girl, and three years later the legislature of Quebec enacted that any person owning a public laundry should pay a provincial tax of £11, an imposition additional to the annual local licence fee of £10.

On the face of it the latter enactment is not so invidious as the former. Nevertheless it is clearly directed against the Chinese, since the enactment specifically exempts any such establishment owned by a laundress or incorporated as a limited company and since such public laundry is only managed by Chinese.

Chinese in South Africa

In South Africa, however, the disabilities of the Chinese residing therein before the Act of Union and since permitted to remain, are the most irksome. Being comprehended under the categories of

"Asiatics" and "colored people," they are required to live or carry on business within certain streets, wards, or locations designated by the municipal government. They may not acquire in any province where their residence is unlawful, any interest in land, whether leasehold or freehold, or in any immovable property. They may not use the same post-offices, tramcars, or railway carriages as those used by Europeans. They may not even make use of the side-walks, or stoeps serving as such, in public thoroughfares, or engage in mining or deal in precious metals. Finally, the municipal authorities are invested with large powers in respect of granting or refusing trade licences, especially for unpretentious occupations.

Question of International Good Faith

Now China may well take objection to these harsh and discriminatory measures. It is no doubt true that in international law each state is competent to admit whomsoever it likes, or enact how aliens should reside within its territory. But these rigorous measures are contrary to the stipulation embodied in all the treaties between China and other states that, just as the alien in China shall enjoy full and complete protection in life and property, so shall the Chinese in the territory of each contracting state enjoy similar protection.

We appreciate the economic difficulties which are bound up with this question, but we must also respect international good faith which is predicated in all

international transactions.[1] Until that good faith is impeached or repudiated, one is loath to assume that any act of breach is premeditated or of malice aforethought. Therefore, such discriminatory legislation should be promptly annulled, and full satisfaction accorded to the Chinese nation.

Question of Self-Defence

According to the present treaties every alien has a right to enter China, however undesirable or depraved he may be. Since it is the unprincipled alien who disturbs the tranquillity of the community by his unbridled acts, especially when far from the vigilance of his consul, it is becoming a serious question whether China should not in self-defence rigorously exclude such undesirable alien at the port of entry, rather than wait to deport him after he has entered and run amok. Prevention is better than cure, and *mutatis mutandis*, China may with good reason similarly deny the right of admission to "any person or class of persons deemed by the Minister on economic (as well as other reasonable) grounds, or on account of standard or habits of life, to be unsuited to the requirements" of the Republic.

In these circumstances such matters regarding emigration and immigration will also have to be considered in the impending general treaty revision.

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[1]It is true that in *Musgrove v. Chun Teeong Toy* (1891), the Privy Council held that an alien who had been refused admission into British territory could not in an action at law maintain such right of entry, but that board also declared that "circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native."—1891 A.C. 282.

Conclusion

Here we have in brief some of the most urgent problems connected with the task of treaty revision. The sketch is incomplete, but it is hoped that sufficient attention has been directed to this vital subject.

Illegality of Force

In fairness to China the fact is not to be overlooked that the obligations she has to discharge were not contracted voluntarily, but imposed upon her by superior force. They impair the exercise of her sovereign rights and create for the subjects of treaty states a position more privileged than that accorded to her own subjects. If she seeks legitimate means to restrict the extent of her grants, or construe the treaties *strictu sensu*, it may be easy for the beneficiaries to call it a treaty evasion or contravention. But under identical circumstances it seems hard to conceive that any other nation will not do likewise.

The idea is unedifying that the legality of the alien's status in China is founded upon as well as maintained by the illegality of sheer force, and that at any moment China's arguments may have to be respected if they are effectively supported by the same agency that serves now to keep them in abeyance. To the alien the reflection cannot be comfortable; to the Chinese the sense of injustice is keen.

Doctrine of *Rebus Sic Stantibus*

Moreover it is to be remembered that here, as elsewhere, these treaties are concluded under the tacit

condition *rebus sic stantibus*. If the treaty obligations hinder the natural development of a state, the former must give way, for "self-preservation and development in accordance with the growth and the necessary requirements of the nation are the primary duties of every state."[1]

The bulk of the obligations which China has to perform was contracted as much as even half a century ago. The conditions contemplated at that date have ceased to exist and, with the flight of decades, there has been a vital change of circumstances. These obligations now fetter the free growth and natural development of the new Republic, to the serious menace of even its self-preservation. For example, in matters of neutrality during the present European war, she cannot observe strict neutrality, since under the International Protocol of 1901, she must permit foreign troops to be stationed in her own capital and metropolitan province. Under the circumstances, China is entitled to the protection of the doctrine of *rebus sic stantibus*. Accordingly, she can demand that her treaty arrangements should be immediately revised so as, on the one hand, to harmonise her rights and prerogatives with her duties and obligations in the present world conditions and, on the other, to reserve to herself full liberty to develop her institutions in her own way.

[1]Oppenheim, International Law, I., 572.

Vital Change of Circumstances

Moreover, the conditions contemplated by the negotiators when the present treaties were concluded, have in the flight of decades materially altered. The China contemplated then was an old, decrepit empire, plodding along as best it could, while its vigorous neighbours were forging ahead. It had not long to live and was, perhaps, crawling to its last resting place. If so, it was no great injury to its *amour propre* to treat it as a child, while ostensibly preserving some semblance of respect for its age.

But that was long, long ago. The China of to-day is no longer that of yesterday. Like the awakened sleeper, who wakes up after his long slumber to find that his colleagues have gone far ahead, he is trying his level best to make up for lost time and lost opportunities. Much refreshened and reinvigorated, he is putting forth all his efforts to overtake his companions. The problems he has to solve are complicated and numerous. If so, he deserves every assistance from those who wish him well. Accordingly, for the treaty states to continue to treat such a China which is daily struggling to regain its lost prestige, is to add new insult to the old injury. More than that, it is to deny to China the benefit of the *rebus sic stantibus* doctrine, while applying it to their own relations one with another. Such an ungenerous attitude in the international relations of states who are co-members of the Family of Nations is surely inconceivable. Accordingly, we may look forward to better days.

Need of International Co-operation

With the sight of the awful carnage raging in Europe to-day, men's minds turn instinctively to thoughts of peace. And as the atmosphere slowly reeks with smoke and blood, distracted humanity yearns for peace. But peace is not to be had for the mere asking. For to insure peace, nations must learn to think in terms of peace, not in those of aggression. This surely is the lesson which the present conflagration demonstrates to those who are to reshape this war-ridden world at the post-bellum conference.

Now to insure perpetual or, at least, an enduring peace, nations must learn to co-operate with one another. For if we deny a nation the liberties, the rights, which properly appertain to it, we sow the seeds of future conflicts. As we sow, so shall we reap. Similarly, in the case of China and its treaty states, international co-operation must be the panacea to all known evils. If peace in the Far East, as well as the rest of the world, is to be preserved, the contracting parties will have to treat one another with equal respect and consideration. The injustices, the inequalities, the inconsistencies of the past, must be abolished, and a rational basis of mutual intercourse substituted. For it is only by means of such co-operation that the relations between China and other states can hope to rest on a stable foundation.

Vision of the Future

We are told that as poison fights poison, so the present Armageddon in Europe will kill future wars. If so, the terrible drain of life and wealth will not

have been made in vain. For after this nerve-shattering ordeal, men's hearts will also have been purged and renovated. And then poor humanity will be in a better mood to listen to reason.

After the great wind which rent the mountains, after the fire and earthquake, the still small voice of Justice and Righteousness will be heard. Then out of this holocaust a new world will be born, a new system will be established, and a new régime will be constituted under which all nations will be "free to live their independent lives, working out their own form of government for themselves, and their own national development, whether they be great nations or small states, in full liberty." And when that day shall dawn nations and peoples, cabinets and parliaments, will arise to do homage to the sceptre of Justice.

China and the World

Now that is the vision which all firm belivers in the progress of mankind will behold when the present conflicting passions shall have subsided. And we who have implicit confidence in the ultimate triumph of law and order look forward with calmness to the days when international law and justice will reassert their sway. In that confidence lies our hope that treaty relations between China and other states will be readjusted on rational principles—principles under which all communities may live freely and contentedly, principles which are consecrated by the acclaim of all ages, principles which build up as well as perpetuate mutual intercourse between states on solid, immutable foundations.

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